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EDITOR'S NOTE

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o. 85-202-CFX
tatus: GRANTED

Title: Offshore Logistics, Inc., et al., Petitioners
v.
Beth A. Tallentire, et al.

ocketed:
ugust 6, 1985

Court: United States Court of Appeals
for the Fifth Circuit

ee also:
85-97

Counsel for petitioner: Jones, Keith A.

Counsel for respondent: Sonnier, V. Farley, Hanemann, Charles

ntry	Date	Note	Proceedings and Orders
1	Aug 6 1985	G	Petition for writ of certiorari filed.
2	Aug 28 1985	G	Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as amici curiae filed.
3	Sep 5 1985		Brief of respondents in opposition filed.
4	Sep 5 1985	G	Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae filed.
5	Sep 11 1985		DISTRIBUTED. September 30, 1985
6	Sep 18 1985	X	Reply brief of petitioners Offshore Logistics, et al. filed.
7	Oct 7 1985		Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as amici curiae GRANTED.
8	Oct 7 1985		Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae GRANTED.
9	Oct 7 1985		Petition GRANTED.
			**********
10	Nov 7 1985		Record filed.
11	Nov 7 1985		Certified copy of original record & C. A. proceedings, received. (7 volumes - box).
13	Nov 15 1985		Order extending time to file brief of petitioner on the merits until December 5, 1985.
14	Nov 20 1985	G	Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as amici curiae filed.
15	Nov 20 1985		Joint appendix filed.
16	Nov 21 1985	G	Motion of Kenneth G. Engerrand for leave to file a brief as amicus curiae filed.
17	Dec 2 1985		Motion of Sonat Offshore Drilling, Inc., et al. for leave to file a brief as amici curiae GRANTED.
18	Dec 9 1985		Motion of Kenneth G. Engerrand for leave to file a brief as amicus curiae GRANTED.
19	Dec 5 1985		Brief amicus curiae of United States filed.
21	Dec 5 1985		Brief of petitioners Offshore Logistics, et al. filed.
23	Dec 23 1985		Order extending time to file brief of respondent on the merits until January 15, 1986.
24	Jan 7 1986		Brief amicus curiae of Domingeaux & Wright filed.
25	Jan 7 1986		SET FOR ARGUMENT, Monday February 24, 1986. (1st case).
26	Jan 6 1986		Brief amicus curiae of Association of Trial Lawyers of America filed.
27	Jan 17 1986		Brief amicus curiae of Louisiana Trial Lawyers Assoc. filed.
28	Jan 18 1986		Brief of respondent Beth A. Tallentire filed.
29	Jan 23 1986		CIRCULATED.
30	Jan 18 1986	X	Brief amicus curiae of Texas Trial Lawyers Assn. filed.

c. 85-202-CFX

ntry	Date	Note	Proceedings and Orders
31	Feb 13 1986	X	Reply brief of petitioners Offshore Logistics, et al. filed.
32	Feb 24 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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CLERK

85-202

No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
CORRINE ANN SOUDELIER TAYLOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether state wrongful death statutes may be given independent force and effect on the high seas, even though they implicate substantive duties of care or provide measures of liability that are different from or inconsistent with those under general maritime law and the Death on the High Seas Act.

2. If not, whether federal courts sitting in admiralty may borrow wrongful death remedies from state law in order to supplement the remedy made available by the Death on the High Seas Act for deaths resulting from the breach of federal maritime duties.*

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* The caption of the case in this Court contains the names of all parties to the proceeding in the court of appeals. The partially owned subsidiaries and affiliates of petitioner Offshore Logistics, Inc., are listed in App. F, *infra*.

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IN THE

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OCTOBER TERM, 1985

No. 85-

OFFSHORE LOGISTICS, INC.,
Petitioner,
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CORRINE ANN SOUDELIER TAYLOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 754 F.2d 1274. The opinions of the district court (App. B and App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1985. A timely suggestion of rehearing *en banc* was denied on May 8, 1985 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, clause 2, of the Constitution of the United States in pertinent part provides:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

Article VI, clause 2, of the Constitution of the United States in pertinent part provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

The Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.* (1982), and the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985), are set forth at App. E, *infra*.

STATEMENT

These consolidated actions for wrongful death arise from the fatal crash of a helicopter in the Gulf of Mexico, approximately thirty-five miles off the coast of Louisiana. The helicopter was owned and being operated at the time of the crash by Air Logistics, a division of Offshore Logistics, Inc., a corporation organized under the laws of Louisiana.

The actions were brought in the United States District Court for the Eastern District of Louisiana. The plaintiffs, surviving wives of two men killed in the crash, asserted claims against Air Logistics under, *inter alia*, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761 *et seq.* (1982), and the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985). DOHSA allows "fair and just compensation for . . . pecuniary loss." 46 U.S.C. § 762 (1982). The Louisiana wrongful death statute permits recovery for non-pecuniary injuries as well, "includ[ing] loss of consortium, service, and society . . . ." La. Civ. Code Ann. art. 2315(B) (Supp. 1985). Plaintiff Tallentire invoked both admiralty jurisdiction under 28 U.S.C. § 1333(1) (1982) and diversity jurisdiction under 28 U.S.C. § 1332(a)(1) (1982). Plaintiff Taylor invoked only admiralty jurisdiction.

The district court, holding that the remedy provided by DOHSA is exclusive, struck the plaintiffs' claims under Louisiana law before trial. Air Logistics admitted liability, and trial was limited to the question of the amount of damages for pecuniary injuries under DOHSA. On appeal, the plaintiffs argued that they also should have been permitted to recover damages for non-pecuniary injuries under the Louisiana wrongful death statute.

The court of appeals, with one judge specially concurring and one judge dissenting, "reverse[d] the district court's denial of benefits recoverable under Louisiana law." App. A, *infra*, at 2a. The court treated the issue solely as one of statutory preemption, and it acknowledged that Louisiana law is "inconsistent with DOHSA." *Id.* at 7a.[1] The court nevertheless held that "a state statute which is effective to grant rights resulting from deaths on the high seas is not preempted by DOHSA." *Id.* at 13a. After determining that Louisiana could and would apply its tort law to acts committed by a Louisiana corporation on the high seas, *id.* at 18a-24a, the court vacated with instructions that the claims asserted under state law should be tried pursuant to diversity jurisdiction in *Tallentire* and pursuant to pendent jurisdiction in *Taylor*. *Id.* at 24a; *see also id.* at 6a n.6.

The court of appeals believed that its holding was compelled by "the clear mandate of section 7 of DOHSA," App. A, *infra*, at 2a, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by

---

[1] The court therefore concluded that Louisiana law was not made applicable by the Outer Continental Shelf Lands Act, which adopts state laws only "[t]o the extent that they are . . . not inconsistent with . . . other federal laws . . . ." 43 U.S.C. § 1333 (1982). *See* App. A, *infra*, at 7a-8a.

this chapter." 46 U.S.C. § 767 (1982). The court "recognize[d] that this holding places us in conflict with the Ninth Circuit['s decision in] *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983) . . . ." App. A, *infra*, at 17a. The court admitted, moreover, that its holding "does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades . . . ." *Id.*[2]

In his special concurrence, Judge Jolly expressed serious reservations:

> The result we reach in this case creates significant problems in the field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas. . . .
>
> . . . [T]his result may create a mess in more than a few cases.

App. A, *infra*, at 28a-29a.

Judge Garza, in his dissent, argued that the majority had misread section 7 of DOHSA:

> Historically, state wrongful death actions provided the remedy for deaths occurring on territorial waters. . . . [S]ection 7 preserved the then existing state law remedies available for deaths on territorial waters. It did not then, and does not now, expand

[2] The Fifth Circuit, like the Ninth Circuit, earlier had held that, following this Court's decisions in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), state wrongful death statutes are preempted within territorial waters. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976). The court below commented that "[i]t is indeed profoundly unsettling that state law will have nothing to do with a claim for wrongful death which occurs on the Mississippi River, yet might apply to the death of an offshore worker forty miles from land . . . ." App. A, *infra*, at 18a.

> the exclusive remedy [for deaths on the high seas] created by DOHSA.

App. A, *infra*, at 29a-30a.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's holding that state wrongful death statutes may be given independent force and effect on the high seas constitutes a radical departure from settled principles of maritime law. The court acknowledged a direct conflict with *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983), but its decision also is inconsistent with a long line of authority in this Court, beginning at least as early as *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875), and culminating most recently in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). Unless reversed, the decision below will frustrate the important goal of maritime uniformity and destroy the integrity of DOHSA as a uniform and exclusive remedy for death on the high seas.[3]

1. *State wrongful death statutes may not be given independent force and effect on the high seas.* Before the enactment of DOHSA in 1920, there was no uniform federal "remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970). Consequently, federal courts sitting in admiralty occasionally would borrow from state law in order to provide a remedy for wrongful death. *See id.* at 393 and n.10. The borrowing of state remedies was something of an anomaly, however, for substantive duties of care on the high seas derive from general maritime law, not from state tort law. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918). *Cf. Pope & Talbot,*

[3] The decision below also forms the basis for the petition for a writ of certiorari in *Petroleum Helicopters, Inc. v. Sincox*, No. 85-97. In that case, the Fifth Circuit simply followed its earlier opinion in this case.

Inc. v. Hawn, 346 U.S. 406, 409 (1953) (general maritime law provides substantive duty of care in territorial waters); *but cf. Hess v. United States*, 361 U.S. 314 (1960), and *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960) (majority and dissenting opinions differ over source of substantive law in territorial waters). The enactment of DOHSA ended this anomaly. By providing a federal remedy for breach of the federal maritime duty of care, "DOHSA brought a measure of uniformity and predictability to the law on the high seas . . . ." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 621.

The same considerations that led to enactment of DOHSA also underlay this Court's determination in *Moragne* that there should be a general maritime remedy for wrongful death in territorial waters:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

398 U.S. at 401. As a consequence of this Court's subsequent decision in *Higginbotham*, it is now established that the remedy for wrongful death is supplied by general maritime law in territorial waters, and by DOHSA on the high seas. The resulting characteristic feature of admiralty law is that federal remedies are supplied for the breach of federal maritime duties, whether in territorial waters or on the high seas.

The decision below pushes admiralty law in a sharply different direction. The Court's opinion may be read as reviving the discarded practice by which a court sitting in admiralty borrows from state law in order to provide a remedy for the breach of a federal maritime duty on the high seas. But the true import of the opinion appears to be far broader. The apparent result of the decision

below is to establish for the high seas a separate but overlapping regime of state law, pursuant to which state remedies are supplied for the breach of state duties.[4]

That result turns admiralty law on its head. It has long been understood that state and federal systems of tort law may not co-exist side-by-side at sea. It has long been understood, in other words, that states are preempted from enforcing conflicting or overlapping duties of care and measures of liability on the high seas.

Preemption flows, in the first instance, not from DOHSA but from the Constitution itself. Thus, in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 161 (1920), this Court held that Congress cannot empower the states to provide workmen's compensation rules even for territorial waters. *See also The Lottawanna*, 88 U.S. (21 Wall.) at 575 ("[i]t certainly could not have been the [Framers'] intention to place the rules and limits of maritime law under the disposal and regulation of the several States . . ."). The Court prescribed a three-part constitutional test for maritime preemption in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917):

> [N]o [state] legislation is valid if it [1] contravenes the essential purpose expressed by an act of Congress or [2] works material prejudice to the characteristic features of the general maritime law or [3] interferes with the proper harmony and uniformity of that law . . . .

---

[4] The court determined that Louisiana "will apply its tort law to an event or a transaction occurring [elsewhere], if Louisiana has a sufficient interest in the transaction," App. A, *infra*, at 23a, and that the state's power to enforce its own tort law on the high seas "is not preempted by DOHSA," *id.* at 13a. The court remanded for trials of the plaintiffs' "right of action under the Louisiana statute." *Id.* at 6a n.6. The trials apparently are to be conducted not in admiralty but in the exercise of diversity or pendent jurisdiction, *id.*, and thus the trial court will be "bound to apply state law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Louisiana tort law, as applied to the high seas, does not pass that test.

The Fifth Circuit in this case concentrated solely on the first part of the *Jensen* test and reasoned that extension of Louisiana tort law to the high seas would not contravene the essential purpose of DOHSA. But Congress' intention in enacting DOHSA was to provide an "exclusive [remedy] for deaths on the high seas." S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3 (1920). "This [was] for the purpose of uniformity, as the States cannot properly legislate for the high seas." S. Rep. No. 216 at 3; H.R. Rep. No. 674 at 4. The saving clause in section 7 of DOHSA, upon which the court below relied, was merely "put in out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law." 59 Cong. Rec. 4483 (Mar. 17, 1920) (statement of Rep. Montague).[5] Recognizing state wrongful death remedies on the high seas would directly contravene the essential purposes of exclusivity and uniformity. The Fifth Circuit erred in not following the Ninth Circuit's earlier holding that "where it is applicable, the Death on the High Seas Act preempts state wrongful death statutes." *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d at 80. *See also Barbe v. Drummond*, 507 F.2d 794, 801 n.10 (1st Cir. 1974); *Dugas v.*

[5] Section 7 later was amended during floor debate in the House of Representatives. But it does not appear from the debate that the House intended to defeat the underlying objective of establishing a uniform and exclusive remedy for death on the high seas. To the contrary, the predominant view expressed in the House was that federal jurisdiction over the high seas was and would be exclusive, no matter what section 7 said. *See, e.g.*, 59 Cong. Rec. 4484 (Mar. 17, 1920) (statement of Rep. Igoe); *id.* at 4485 (statement of Rep. Volstead); *id.* at 4486 (statement of Rep. Goodykoontz). "[T]he approval of the amendment represented no more than the acceptance of what appeared to be an innocuous change in language to facilitate the immediate passage of the legislation." *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 90 (N.D. Cal. 1954).

National Aircraft Corp., 438 F.2d 1386, 1388 (3d Cir. 1971).[6]

But quite apart from Congress' stated and essential purpose in enacting DOHSA, the *Jensen* test cannot be met here. To enforce state tort law on the high seas unquestionably would work material prejudice to the characteristic features of general maritime law—the second part of the *Jensen* test. It suffices here to point to five major discrepancies between general maritime and state tort doctrines: the basic concepts are different;[7] the standards of care are different;[8] the right of action

[6] Scholarly commentators also have adhered to the view that DOHSA supersedes state law. *See, e.g.*, Magruder and Grout, *Wrongful Death within the Admiralty Jurisdiction*, 35 Yale L.J. 395, 416 (1926); Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L. Rev. 648, 651 (1964); Note, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 Geo. L.J. 1411, 1417 (1971).

[7] As this Court pointed out in *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 401 n.15:

> The incongruity of forcing the States to provide the sole remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness.

[8] The standards of care imposed by general maritime law and state tort laws diverge in myriad ways. For example, whereas general maritime law subjects commercial sellers to strict product liability, Louisiana law does not. *Compare Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984), *with Hudgens v. Interstate Battery Systems of America, Inc.*, 393 So.2d 940 (La. Ct. App. 1981).

is conferred on different persons;[9] different defenses are available;[10] and measures of liability are different.[11] If state tort laws were added to federal maritime law to form a composite system of rules for the high seas, the result would be a body of law very different from admiralty law as we know it today.

Enforcement of state tort law on the high seas also would interfere drastically with the proper harmony and uniformity of maritime law—the third part of the *Jensen* test. If a state could legislate duties of care for the high seas at all, presumably it could do so solely with respect to its own citizens or residents. *Cf. Skiriotes v. Florida*, 313 U.S. 69, 77 (1941). Under the decision below, therefore, it appears that persons from different states would carry with them onto the high seas different duties of care and different potential defenses. This implies, in turn, that remedies for wrongful death would vary according to the residence of the tortfeasor—a factor that, from the perspective of survivors or decedents, would be no more than mere happenstance.[12] The extension of a hodgepodge of different state duties and remedies onto the high seas would defeat "the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Moragne v. States Marine Lines, Inc.*, 398 U.S. at 402, *quoting The Lottawanna*, 88 U.S. (21 Wall.) at 575.[13]

2. *DOHSA remedies may not be supplemented by borrowing wrongful death remedies from state law.* The Fifth Circuit concluded that the Louisiana wrongful death statute "grants . . . rights of its own force as state law." App. A, *infra*, at 5a-6a. But to enforce state tort law on the high seas would be so mischievous, and so far removed from past admiralty practice, that the court may not have intended that result. The court actually may have contemplated only that federal courts sitting in admiralty would borrow from state law in order to supplement the remedy made available by DOHSA for deaths resulting from a breach of federal maritime duties on the high seas.[14] The borrowing of supplemental remedies, however, is precluded by this Court's decision in *Higginbotham*.

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[9] For example, DOHSA permits recovery only for the benefit of a spouse, parent, child, or dependent relative, 46 U.S.C. § 761 (1982), whereas Louisiana would allow recovery by a surviving sibling whether or not dependent, La. Civ. Code Ann. art. 2315(D)(1)(c) (Supp. 1985).

[10] DOHSA imposes a three-year period of limitation and applies the doctrine of comparative negligence. 46 U.S.C. §§ 763a and 766 (1982). State laws vary widely on these points.

[11] In this case, for example, the plaintiffs are resorting to Louisiana law in an effort to recover damages for non-pecuniary injuries that are not compensable under DOHSA. *See* App. A, *infra*, at 5a.

[12] The problem of nonuniform remedies would remain—indeed, it would be magnified—if state wrongful death statutes were read as enforcing only general maritime duties and not state tort duties. Once remedy is divorced from duty, the choice of remedial law becomes almost completely arbitrary. There is no established rule, for example, for determining which state's wrongful death statute should govern in the situation where the decedent resided in state A, the joint tortfeasors resided in states B and C, the survivors resided in states D and E, the accident occurred nearest the territorial waters of state F, and the duty was imposed by general maritime law. *Cf. Lauritzen v. Larsen*, 345 U.S. 571, 583-91 (1953). As this example suggests, if state remedies but not state duties are extended to the high seas, there could be different remedies even for wrongful deaths resulting from the same accident.

[13] As the court below pointed out, moreover, there would be disharmony and lack of uniformity not only in the application of the law among different tortfeasors but also in its application to different maritime locales: on the high seas, state law would apply; in territorial waters, paradoxically, it would not. App. A, *infra*, at 18a. The Ninth Circuit accurately described this to be "a result as damaging to uniformity in wrongful death actions as it is illogical." *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d at 80.

[14] The court's opinion reflects uncertainty concerning whether, as a jurisdictional matter, state wrongful death claims could be brought in admiralty. *See* App. A, *infra*, at 24a. This may indicate confusion about the source of the substantive duty of care.

The issue in *Higginbotham* was whether federal courts sitting in admiralty may provide a more liberal remedy for wrongful death on the high seas than that furnished by DOHSA. This Court held that they may not:

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitation period, contributory negligence, survival, and damages. . . . The Act does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Mobil Oil Corp. v. Higginbotham, 436 U.S. at 625. The plain meaning of that decision, as the Ninth Circuit correctly recognized in *Nygaard*, is that DOHSA establishes a uniform and exclusive remedy for wrongful death on the high seas that may not be enlarged or supplemented by borrowing from some other body of law.

To be sure, the lower court in *Higginbotham*—the Fifth Circuit, once again—had sought to supplement DOHSA by borrowing from general maritime law rather than from state law. But this Court already had determined that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Moragne v. United States Marine Lines, Inc.*, 398 U.S. at 401 n.15. If the Court had intended to permit DOHSA remedies to be supplemented through borrowing, it would have turned to general maritime law, not to state tort law. *See Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (general maritime law allows recovery for non-pecuniary injuries resulting from death in territorial waters). Instead, the Court broadly concluded that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements." *Mobil Oil Corp. v. Higginbotham*, 436 U.S.

at 625. As support for that conclusion, moreover, the Court cited the First Circuit's statement in *Barbe v. Drummond*, 507 F.2d at 801 n.10, and the holding in *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (N.D. Cal. 1954), that state wrongful death remedies are not available on the high seas. *See* 436 U.S. at 625. It is apparent, therefore, that this Court intended to foreclose all borrowing of remedies, and specifically the borrowing of remedies from state law.

This conclusion also follows from the Court's discussion of maritime uniformity. The argument made in *Higginbotham* in favor of borrowing from general maritime law was that it would harmonize wrongful death remedies on the high seas with those made available in territorial waters by *Gaudet*. This Court acknowledged the importance of uniformity but explained that DOHSA was controlling and exclusive. The Court noted, however, that its decision would merely result in applying "one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 624 n.18. In other words, although the law in territorial waters is different from that on the high seas, each law has the virtue of internal uniformity. To permit DOHSA remedies to be enlarged and supplemented by borrowing from the various and conflicting laws of the separate states would run directly counter to this Court's stated understanding that a single "national rule [governs] accidents farther from land." *Id.* The resulting patchwork of remedies would make a mockery of the notion of maritime uniformity on the high seas.[15]

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[15] The problem of nonuniformity would be exacerbated, moreover, by the lack of any reliable guide concerning which state's law to borrow. *See* note 12, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

August 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 83-3296, 83-3328

BETH A. TALLENTIRE,
Plaintiff-Appellant,

v.

OFFSHORE LOGISTICS, INC., *et al.*,
Defendants,

AIR LOGISTICS,
Defendant-Appellee.

CORINE ANN SOUDELIER TAYLOR, Individually,
as administratrix of the estate of MICHAEL JOHN TAYLOR,
and as natural tutrix of the minor, LESLIE ANN TAYLOR,
Plaintiff-Appellant Cross-Appellee,

v.

BELL HELICOPTER TEXTRON, a DIVISION OF TEXTRON, INC.,
Defendant.

CORINE ANN SOUDELIER TAYLOR, ETC.,
Plaintiff-Appellant Cross-Appellee,

v.

AIR LOGISTICS, INC.,
Defendant-Appellee Cross-Appellant,

v.

HALLIBURTON SERVICES,
Intervenor-Appellee.

March 15, 1985

Before GARZA, JOLLY and DAVIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

These consolidated cases stem from the death of two offshore workers in the crash of a helicopter some thirty miles off the Louisiana coast. The helicopter was owned and operated by Air Logistics, a division of Offshore Logistics, Inc., and was manufactured by Bell Helicopter, a division of Textron, Inc. Air Logistics is a division of Offshore Logistics, a Louisiana corporation, (hereafter referred to as Air Logistics); Bell is a Delaware corporation with its principal place of business in Rhode Island. Both actions included claims under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 et seq., the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 et seq., and the law of Louisiana. The district court held that DOHSA furnished Taylor and Tallentire with their exclusive remedy. Air Logistics admitted liability. Bell did not admit liability, but agreed to pay any judgment which Air Logistics was unable to satisfy. Pursuant to the trial judge's pretrial ruling restricting the claims to those arising under DOHSA, and striking all claims founded on Louisiana law, trial was devoted solely to the issue of damages under DOHSA. No evidence of Bell's liability was introduced at trial, and no party appeals the judgment in its favor, thus the only defendant before us is Air Logistics.

In this appeal, Taylor and Tallentire press a common claim that Louisiana's wrongful death statute applies to this helicopter crash on the high seas, either of its own force or as adopted federal law through section 1333 of OCSLA. In view of the clear mandate of section 7 of DOHSA reserving to litigants their rights of recovery under state wrongful death acts, we reverse the district court's denial of benefits recoverable under Louisiana law.

I. APPLICABILITY OF STATE WRONGFUL DEATH STATUTES TO HIGH SEAS DEATHS

A. BACKGROUND

Today we are invited to make further adjustments in the volatile field of maritime wrongful death and for the sake of clarity, our analysis of the subject requires a brief historical discussion.

The jurisprudential and legislative saga leading to this decision began almost a century ago when the Supreme Court held in *THE HARRISBURG*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) that the general maritime law of the United States afforded no remedy for wrongful death. The admiralty courts were not entirely stymied by this forced parsimony and state wrongful death acts, if available, were enforced in admiralty to allow recovery in wrongful death cases.[1] This practice was approved by the Supreme Court in the case of a high seas death in *THE HAMILTON*, 207 U.S. 398, 52 L.Ed. 264, 28 S.Ct. 133 (1907). Though the admiralty courts were disposed to grant a remedy when one could be fashioned,[2] in the

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[1] *See, e.g. Southern Pacific Co. v. De Valle Da Costa*, 190 Fed. 689 (1st Cir. 1911); *International Navigation Co. v. Lindstrom*, 123 F. 475 (2d Cir. 1903); *The City of Norwalk*, 55 F. 98 (S.D.N.Y. 1893).

[2] See the often-quoted passage from Chief Justice Chase's opinion in *THE SEA GULL*, 21 F.Cas. No. 12,578 p. 909 (C.C.Md. 1865):

> [T]here are cases, indeed, in which it has been held that in a suit at law, no redress can be had by the surviving representative for injuries occasioned by the death of one through the wrong of another; but these are all common-law cases, and the common law has its peculiar rules in relation to this subject, . . . and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold

case of high seas deaths the coverage supplied by state statutes was not uniform, and did not adequately fill the void left by *THE HARRISBURG*. This is one of the considerations which led to the passage in 1920 of DOHSA and its companion legislation, the Jones Act (currently codified at 46 U.S.C. § 688 et seq.) *See Moragne v. States Marine Lines*, 398 U.S. 375, 393-94, 90 S.Ct. 1772, 1783-84, 26 L.Ed.2d 339, 351-53 (1970). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if the death had not ensued.

46 U.S.C. § 761.

After 1920, DOHSA supplied a uniform remedy for deaths occurring over a marine league from shore; within territorial waters, after some initial confusion, state statutes continued to hold sway.[3] The evolution of maritime wrongful death remedies continued in 1970 with *Moragne v. States Marine Lines*, in which the Supreme

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the remedy, when not required to withhold it by established and inflexible rules.

Id. at 910.

[3] *See, e.g. Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921); *THE TUNGUS v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959).

Court overruled *THE HARRISBURG* and established a remedy for wrongful death grounded in the general maritime law of the United States. Six years later, this circuit held in *In re S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), that after *Moragne* there was no longer any reason for admiralty courts to apply state wrongful death acts in territorial waters. A further critical development occurred in 1978 with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), in which the Supreme Court held that damages recoverable under DOHSA may not be supplemented by the *Moragne* death remedy. Generally, in post-*Higginbotham* actions by survivors of non-seamen, this circuit was left with the *Moragne* remedy supreme in territorial waters, DOHSA supreme on the high seas, and state statutes, it was strongly hinted, out of the picture altogether.[4]

The problem we have before us now arises because DOHSA permits recovery of only pecuniary damages—lost wages, loss of services, and the like.[5] Many state wrongful death acts, including Article 2315 of the Louisiana Civil Code, allow recovery for non-pecuniary losses such as loss of love and affection. In an effort to recover these non-pecuniary losses, Taylor and Tallentire offer two alternative theories under which the Louisiana statute could apply to their actions. The first is that Article 2315 applies through section 1333 of OCSLA. The second is that DOHSA does not preempt state wrongful death acts, and Article 2315 grants them rights of its

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[4] *See Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 384 n. 6 (5th Cir. 1983) (DOHSA likely preempts state wrongful death remedies; citing *Higginbotham*).

[5] 46 U.S.C. § 762:

> [T]he recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought . . .

own force as state law. We address each of these contentions in turn.[6]

B. APPLICATION OF LOUISIANA LAW THROUGH § 1333 OF OCSLA

"The purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf." *Rodrigue v. Aetna Casualty & Surety*

[6] Before venturing into the merits, we note the bases for federal jurisdiction to consider wrongful death claims asserted under Louisiana law by Taylor and Tallentire. In the Tallentire case, there appear to be two separate bases for federal court jurisdiction at the time the suit was filed: (1) diversity of citizenship, since Beth Tallentire is a citizen of Pennsylvania and thus diverse as to both Air Logistics and Bell Helicopter; and (2) admiralty jurisdiction, since the helicopter ferrying the decedents ashore crashed on navigable waters. *LeDoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824, 824 (5th Cir. 1980).

In the Taylor case, since the plaintiff and Air Logistics are both Louisiana residents, the sole jurisdictional base present is admiralty jurisdiction under *LeDoux*.

Assuming the existence of a right of action under the Louisiana statute, the federal court has in any case the power to decide this state law claim under its pendent jurisdiction. A DOHSA claim and an article 2315 claim are obviously of the sort that, if considered without regard to their state or federal character, would ordinarily be expected to be tried in one judicial proceeding. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218, 228 (1966). The decision to exercise pendent jurisdiction is of course a matter of discretion, but when, as here, the considerations of judicial economy and convenience would be served, adjudication of state law claims is to be expected. *Hagans v. Lavine*, 415 U.S. 528, 545-46, 94 S.Ct. 1372, 1383-84, 39 L.Ed.2d 577, 592-93 (1974). A federal court may exercise its pendent jurisdiction over state law claims when the jurisdictional base of the main claim is in admiralty. *E.g. Norfolk & Western Co. v. United States*, 641 F.2d 1201, 1208 n. 4 (6th Cir. 1980). Since pendent jurisdiction over the Article 2315 claims will be available in any case, the primary effect of which jurisdictional theory is actually used will be on whether plaintiffs are entitled to a jury trial, a matter which is discussed infra.

Co., 395 U.S. 352, 355, 89 S.Ct. 1835, 1837, 23 L.Ed.2d 360, 364 (1969). Section 1333 of OCSLA adopts the law of the adjacent state, including tort law, as surrogate federal law for the area the act covers.[7] This provision was included in OCSLA in recognition of the fact that offshore workers were likely to have significant ties with adjacent states. Since the decedents in this case were platform workers, although their deaths did not occur on a platform, Taylor and Tallentire assert that OCSLA should apply.

Assuming that OCSLA does apply, it nonetheless would not permit recovery of non-pecuniary damages via the Louisiana statute. Section 1333 of OCSLA adopts state laws as surrogate federal law only "to the extent that they are applicable and not inconsistent with this subchapter *or other federal laws or regulations* . . . ." 43 U.S.C. § 1333 (emphasis added). It is established in

[7] 43 § 1333:

> (a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, . . .

43 U.S.C. § 1333 (emphasis in original).

this circuit that DOHSA applies to crash of a helicopter on the high seas, so Louisiana law could be adopted only to the extent it is not inconsistent with DOHSA.[8] This leaves the far more difficult question of whether state wrongful death statutes are preempted by DOHSA.

C. PREEMPTION OF STATE STATUTES BY DOHSA

The heart of this issue is the interpretation of section 7 of DOHSA:

> *The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.* Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

46 U.S.C. § 767 (emphasis added).

We begin with the proposition that section 7 is broad enough on its face to support Taylor and Tallentire's argument that if a state statute grants a right to recover for a high seas death, it is not preempted by DOHSA. As discussed more fully below, however, there has been considerable uncertainty over the effect of this seemingly simple provision. The heart of the debate over the interpretation of section 7, in turn, is the effect of the ill-starred "Mann Amendment."

As originally drafted, section 7 read "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any state . . .", 59 *Cong. Rec.* 4482 (1920), a formulation which would obviously allow DOHSA to pre-

[8] *See Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111-12 (5th Cir. 1982); *see also Kimble v. Noble Drilling Corp.*, 416 F.2d 847, 850 (5th Cir. 1969), *cert. denied*, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970).

empt state remedies on the high seas. During floor debate on the bill, Representative Mann of Illinois introduced an amendment to strike the phrase "as to causes of action accruing within the territorial limits of any state," *id.* at 4484, leaving the provision in its present form. The debate at the time reflects considerable confusion among the members of Congress concerning the effect of the amendment, a confusion which is reflected over the next sixty years in the conflicting decisions of federal courts interpreting section 7.[9] A number of decisions interpret section 7 as Air Logistics would have us interpret it, to preserve state remedies only *in territorial waters.*[10] Other decisions take the opposite view, that section 7 is effective to preserve state remedies on the high seas as well.[11] The former position is based primarily on the belief, drawn from the floor debate, that regardless of what Representative Mann intended, Congress as a whole intended DOHSA to be an exclusive

[9] Congressman Goodykoontz spoke more prophetically than he realized when he remarked during the debate that "the effect of the amendment would be to leave the sentence incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular." *Id.* at 4486.

[10] *See, e.g., Jennings v. Goodyear Aircraft Corp.*, 227 F.Supp. 246, 248 (D. Del. 1964); *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D. Cal. 1954). *See also Barbe v. Drummond*, 507 F.2d 794, 801 n. 10 (1st Cir. 1974); *Devlin v. Flying Tiger Lines, Inc.*, 220 F.Supp. 924 (S.D.N.Y. 1963). Other decisions state that DOHSA preempts state remedies without mentioning section 7 at all. *E.g., Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983); *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F.Supp. 447, 452 (S.D.N.Y. 1964); *Blumenthal v. United States*, 189 F.Supp. 439, 446 (E.D. Pa. 1960).

[11] *See, e.g., In re Complaint of Exxon Corp.*, 548 F.Supp. 977, 978 (S.D.N.Y. 1982); *Alexander v. United Technologies Corp.*, 548 F.Supp. 139, 142 (D. Conn. 1982); *Rairigh v. Erlbeck*, 488 F.Supp. 865 (D. Md. 1980); *Safir v. Compagnie General Transatlantique*, 241 F.Supp. 501, 508 (E.D.N.Y. 1965). *Cf. Sierra v. Pan American World Airways*, 107 F.Supp. 519, 520-21 (D.P.R. 1952).

remedy. The case most frequently cited for this proposition is *Wilson v. Transocean Airlines*, 121 F.Supp. 85 (N.D.Cal. 1954), in which the court reviewed the legislative history of DOHSA in general, the Mann amendment in particular and concluded:

> [I]t is not at all clear that the subsequent approval of the amendment should be accepted as an indication that the intent of the Congress coincided with that of the amendment's author. It is equally likely that the approval of the amendment represented no more than the acceptance of what appeared to be an innocuous change in language to facilitate the immediate passage of the legislation. . . . An ambiguous and ill-considered amendment to the bill, which became the Act, is not [sufficient reason to ignore the original purpose of DOHSA.]

Id. at 90-91.

The congressional debate reflects a number of differing concerns and beliefs on the part of the legislators. These include whether the federal courts would have exclusive jurisdiction of DOHSA claims and whether causes of action granted by state statutes would be affected or preempted by DOHSA. The debate is not couched in the most precise legal terminology, and it appears that the term "jurisdiction" was used indiscriminately to refer to both the power of state or federal courts to hear a particular case and the power of a state to grant a right of recovery. Thus, at some points it is not entirely certain whether the subject of discussion is the power of state courts to hear DOHSA claims or the power of states to provide a remedy in addition to DOHSA. Some of the congressmen apparently believed that once Congress had legislated in this area, state statutes would be preempted regardless of any language to the contrary.[12] It is certain, however, that Representative Mann intended that if a state remedy was available, it would remain available.[13]

[12] Mr. MONTAGUE. In reply to the statement of my colleague [Mr. Moore] I will say that jurisdiction upon this subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asservation in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

Mr. VOLSTEAD. My impression is it would be exclusive upon the theory the gentlemen [Mr. Montague] suggests.

* * * *

Mr. VOLSTEAD. The view taken by the parties who drew this bill is that it is exclusive, because, as the gentleman from Virginia [Mr. Montague] pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject.

Mr. DEWALT. If that is true, as to that sort of accidents resulting in death, and if there be no doubt about that, according to the gentlemen from Virginia [Mr. Montague], and the gentleman's interpretation, and it being exclusive only as to matters occurring on the high seas, and also that the States have jurisdiction in regard to matters happening in their territorial limits, what is the use in having section 7?

59 Cong. Rec. at 4483-4485.

[13] Mr. MANN of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody:

> We are very anxious to have the bill go through in its present simple form, which avoids conflict with State

After a thorough review of the debate surrounding the Mann amendment to section 7, we agree with the court in *Wilson* that some members of Congress accepted the amendment so the bill could muster the necessary votes

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statutes and yet remedies a crying defect in the maritime law as administered in this country—

and so forth.

If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.

* * * *

Mr. SANDERS of Indiana. I would like to know what the effect of this law would be if the amendment offered by the gentleman from Illinois [Mr. Mann] be adopted with reference to this particular question: As thus amended, the first sentence in section 7 will read, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act." Now, as I understand it, if a person living in Illinois should be in the beneficiary class, should be, say, the widow of a person who had been killed on the high seas, that person may now bring action in personam in the State court of Illinois, and the damages recovered shall then be distributed in accordance with the provisions of the State statutes. Now, if this act is passed as thus amended, it will give that widow the right to elect as to whether she shall proceed under the terms of the act conferring jurisdiction upon the Federal courts with reference to this matter, or whether she shall proceed under the State statute of Illinois. Is that the gentleman's understanding?

Mr. VOLSTEAD. That is my view of it, and my understanding is that in the form in which the bill at one time was drawn there was a provision something like this, and there was a precautionary clause added to prevent a double action; that is, to prevent action first in the State court and then afterwards an action in the Federal court.

Mr. SANDERS of Indiana. The reason I raised the question is that you notice here that the action is for the benefit of the husband, parent, or child. My recollection of the action for

for passage. Nevertheless, the debate reflects an intent by the author of the amendment and others to preserve state remedies and the amendment carried the day. In this circumstance, an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless. It is also unnecessary in light of the clear language of the statute. Absent a clearly-expressed legislative intention to the contrary, the plain words of the statute must ordinarily be regarded as controlling. *Escondido Mutual Water v. LaJolla Indians*, —— U.S. ——, ——, 104 S.Ct. 2105, 2110, 80 L.Ed.2d 753, 761 (1984). Since the language of section 7 is clear, we conclude that a state statute which is effective to grant rights resulting from deaths on the high seas is not preempted by DOHSA.

Air Logistics advances five arguments why section 7 should not be given the interpretation we have given it. Each of these points deserves consideration, although ultimately none is persuasive.

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wrongful dealth in Illinois is that the child precedes the parent in the beneficial interest. It seems to me this might give conflicting rights. If the right of action were in one person in either case, then, of course, having elected to proceed under one provision, he would be barred from proceeding under the other provision. But suppose that the parent had the right to proceed in admiralty in the Federal courts under this law, and suppose under the State law of Illinois the child had the right to proceed. Now, how are you going to have an election in that case when the right to elect is not in the same person?

* * * *

Mr. MANN of Illinois. We give a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined.

* * * *

Mr. VOLSTEAD. It would be a good deal simpler if we should leave the statute in the form in which it is drawn.

Mr. MANN of Illinois. It would be a good deal wickeder.

59 Cong. Rec. at 4484-85 (emphasis added).

i. *Dore v. Link Belt Co.*

As an initial matter, Air Logistics argues that *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968), *reversed sub nom Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969) controls this case. In *Dore*, the survivors of a worker killed when he fell from an offshore platform contended, as do the plaintiffs in this case, that in addition to DOHSA they were entitled to invoke the Louisiana death statute either of itself or through OCSLA. This court rejected both contentions, holding that DOHSA was the plaintiff's sole remedy. 391 F.2d at 674-76. The Supreme Court granted certiorari and reversed, holding that since under the terms of OCSLA offshore drilling platforms were to be treated as federal enclaves located in an upland state, the case was not within the admiralty jurisdiction. Even if there were admiralty jurisdiction, DOHSA did not apply because Congress did not intend that result when it adopted the Lands Act. 395 U.S. at 365-66, 89 S.Ct. at 1842, 23 L.Ed.2d at 370. State law became federal law federally enforced as to platform accidents. There is no indication that the Court considered the circuit court holding that DOHSA preempts state statutes. It determined, however, that Louisiana law applied through OCSLA, and reversed the circuit court decision applying DOHSA to the exclusion of state statutes. We therefore do not consider the *Dore* opinion to control the issue of DOHSA's exclusivity when DOHSA does apply.

ii. *Mobil Oil Corporation v. Higginbotham*

A second argument put forward by Air Logistics is that the Supreme Court decision in *Mobil Oil Corp v. Higginbotham* forecloses supplementation of DOHSA by state statutes.[14] We disagree. *Higginbotham* dealt solely

[14] Air Logistics relies on the following language:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. See nn. 6-10, supra. The Act does not address every issue of wrongful-death law, see e.g., n. 15 supra, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

436 U.S. at 625, 98 S.Ct. at 2015, 56 L.Ed.2d at 587.

with whether damages available under DOHSA could be supplemented by the general maritime wrongful death remedy recognized in *Moragne v. States Marine Lines.* Whether DOHSA preempts state wrongful death remedies was not addressed in the decision. Particularly in light of the interpretation of section 7 of DOHSA set forth above, *Higginbotham* cannot be extended to answer this question.

iii. *In Re S/S HELENA*

Air Logistics also points out that under this court's decision in *In Re S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), state statutes are preempted by the *Moragne* death remedy when death occurs within territorial waters. We agree that the anomaly of allowing state statutes to operate on the high seas but not in territorial waters is apparent. Air Logistics' argument has logic on its side, but again it does not take into account section 7. The general maritime law preempts state law, but DOHSA preempts the general maritime law, and, as explained, section 7 of DOHSA specifically saves state remedies.

iv. *Moragne v. States Marine Lines*

Air Logistics also asserts that section 7 was interpreted by the United States Supreme Court in *Moragne* and *THE TUNGUS v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959) as preserving the effect of

state statutes only within territorial waters. In the passages relied on by Air Logistics, however, the Court is simply quoting from the House and Senate reports on DOHSA.[15] With regard to the *Moragne* opinion in particular, this argument reflects a basic misunderstanding of the context in which the court used this language. The respondent in *Moragne* argued that since DOHSA applied only to deaths occurring more than a marine league from shore, it evidenced a congressional intent to withhold a federal wrongful death remedy within territorial waters. The Court quoted this legislative history in support of its conclusion that Congress did not extend DOHSA to territorial waters simply because state statutes already provided a remedy in that area. 398 U.S. at 395-97, 90 S.Ct. at 1784-85, 26 L.Ed.2d at 353-55.

In *THE TUNGUS*, the respondent argued that a New Jersey death statute should be applied in admiralty without regard to any of the procedural or substantive limitations New Jersey had placed on the right to recover. The Court noted that to accept this argument would be to infringe on the sovereignty Congress intended the states to retain over deaths in a state's territorial waters, and for this proposition quoted the congressional reports. *THE TUNGUS* does not consider the application of state statutes beyond territorial waters. From these sketchy references we cannot derive the conclusion that the Supreme Court has interpreted section 7 to preserve state remedies *only* within territorial waters. In addition, the language in the quoted House and Senate Reports de-

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[15] [DOHSA] would accomplish that result "for deaths on the high seas, leaving unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the states . . . this is for the purpose of uniformity, as the states cannot properly legislate for the high seas." S.Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R.Rep. No. 674, 66th Cong., 2nd Sess., 3, 4 (1920).

398 U.S. at 397, 90 S.Ct. at 1786, 26 L.Ed.2d at 355; *see also THE TUNGUS*, 358 U.S. at 593, 79 S.Ct. at 507, 3 L.Ed.2d at 529.

scribes section 7 as it was constituted prior to the Mann amendment.

v. *Nygaard v. Peter Pan Seafoods*

We recognize that this holding places us in conflict with the Ninth Circuit. In *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983), the Ninth Circuit held that maritime uniformity required the conclusion that DOHSA preempts state statutes. The court stated: "If the federal remedial scheme for death within territorial waters takes precedence over state remedies, then certainly the federal remedial scheme for death on the high seas, where the primacy of federal interests is far clearer, should also take precedence." *Id.* at 80. The discussion of this issue in *Nygaard* does not mention section 7 of DOHSA; indeed we have no way of knowing that section 7 was brought to the court's attention.[16] In light of the interpretation of section 7 mapped out above, we disagree with the conclusion reached in *Nygaard*.[17]

Our holding in this case does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades, and we may agree with our brothers of the Ninth Circuit that to have state law preempted in territorial waters yet operative on the high

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[16] The Ninth Circuit's holding in *Nygaard* was based on the "logical import" of its decision in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), that maritime uniformity requires preemption of state death statutes by the general maritime law. The result reached in *Nelson* is, of course, the same reached by this circuit in *In re S/S HELENA*, discussed *supra*.

[17] We also note that in *Barbe v. Drummond*, the First Circuit noted in dicta that section 7 could be interpreted to preserve state remedies, "but the better authority rejects this view [citing cases, including *Wilson v. Transocean Airlines*]." 507 F.2d at 801 n. 10. Again, as outlined above, the necessary interpretation of section 7 after the Mann amendment is that it allows state remedies to operate on the high seas. The *Barbe* footnote contains no analysis which undercuts this position.

seas is "a result as damaging to uniformity in wrongful death actions as it is illogical." 701 F.2d at 80. It is indeed profoundly unsettling that state law will have nothing to do with a claim for wrongful death which occurs on the Mississippi River, yet might apply to the death of an offshore worker forty miles from land, but this is the legacy of eighty-odd years of haphazard evolution in maritime wrongful death remedies. The remedy for wrongful death on the high seas under DOHSA has not changed since 1920, but remedies for maritime wrongful death occurring in inland waters have been altered almost beyond recognition. Prior to *Moragne* and *In Re S/S HELENA*, a straightforward interpretation of section 7 resulted in no anomaly—state statutes could apply in territorial waters, state statutes could apply on the high seas. Section 7 is simply out of sync with a changing jurisprudence. Nonetheless, *Higginbotham* teaches us that DOHSA must take priority over jurisprudential formulations, and this principle holds as true when the result is one we dislike as when it is one we applaud. If section 7 is to be molded to form a symmetrical whole with other developments in maritime wrongful death law, the artisan must be Congress and not this court.

We turn next to whether Louisiana has the authority to extend the coverage of its wrongful death remedy to the high seas and if so, whether it has elected to do so.

D. LEGISLATIVE JURISDICTION

Air Logistics argues that the states simply do not have the power to legislate with regard to occurrences outside their territorial boundaries. They contend that as a matter of federalism, "Louisiana can no more enact laws governing death on the high seas than it could enact laws governing deaths in Mississippi." This leads us into the relatively unexplored territory of legislative jurisdiction.[18] Many of the decisions which have consid-

[18] Simply stated, legislative jurisdiction is the power of a governmental body to apply its laws to create or otherwise affect legal interests. It is to be distinguished from judicial jurisdiction, which is the bare power of a body to hear a case in its court system, regardless of the law applied. *See generally* Reese, *Legislative Jurisdiction*, 78 Columbia L. Rev. 1587 (1978). No question of Louisiana's judicial jurisdiction is presented by this case.

ered the question whether DOHSA preempts state statutes have glossed or failed entirely to discuss this critical question, and there is little solid, unambiguous precedent in this area which is of any help. After careful consideration, however, we conclude that in this respect Air Logistics paints with too broad a brush. There are certainly constitutional limits on a state's power to apply its laws to order the rights of individuals, but these limits are not determined entirely by geographic and territorial considerations.

From the time of *THE HARRISBURG* until the passage of the Death on the High Seas Act in 1920, state statutes afforded the *only* available remedy for deaths on the high seas. The case most often cited as authority for the use of state statutes in admiralty, both before and after the passage of DOHSA, is *THE HAMILTON*.[19] *THE HAMILTON* appeared to be based on the theory that the "law follows the flag"—the vessels, since they were owned by Delaware citizens, were part of the territory of Delaware regardless of their location [20]—but its discussion was not limited to that proposition. Justice Holmes initially addressed the power of the State of

[19] E.g., *Alexander v. United Technologies Corp.*, 548 F.Supp. 139, 141 (D. Conn. 1982); *Safir v. Compagnie General Transatlantique*, 241 F.Supp. 501, 506-07 (E.D.N.Y. 1965); *THE JAMES MCGEE*, 300 F. 93, 96 (S.D.N.Y. 1923); *So. Pac. Co. v. DeValla Da Costa*, 190 F. 689, 692 (1st Cir. 1911).

[20] Long before *THE HAMILTON*, and indeed even before *THE HARRISBURG*, Judge Pardee of this circuit suggested that Article 2315 of the Louisiana Civil Code might be applied to a death occurring on a vessel owned by Louisiana citizens and based in Louisiana, on the theory that the vessel was a part of Louisiana's territory. *THE E.B. WARD, JR.*, 17 F. 456, 459-60 (C.C. La. 1883).

Delaware to make laws applicable to the high seas, and concluded that if there were no conflict with the Constitution, Delaware could make such laws. The Justice went on to conclude that when Congress was silent on the matter, there was no Constitutional bar to application of the Delaware statute to its own citizens on the high seas. 207 U.S. at 403-04, 28 S.Ct. at 133-34, 52 L.Ed.2d at 269.

In *Skiriotes v. Florida*, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), *THE HAMILTON* was affirmed as standing for a considerably broader proposition than simply that the law follows the flag. Skiriotes was charged with violation of a Florida statute which prohibited the collection of sponges with diving equipment. At the time of the offense he was approximately two marine leagues off the shore of Florida. 313 U.S. at 70, 61 S.Ct. at 926, 85 L.Ed. at 1196. In response to Skiriotes' argument that Florida lacked the power to apply this statute outside territorial waters, Justice Hughes observed that "if the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress." 313 U.S. at 77, 61 S.Ct. at 929, 85 L.Ed. at 1200. This principle was based in part upon *THE HAMILTON*, as Justice Hughes explained:

> [T]he principle recognized in *THE HAMILTON*, *supra*, was not limited by the conception of vessels as floating territory. There was recognition of the broader principle of the power of a sovereign State to govern the conduct of its citizens on the high seas. . . . When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is

> analogous to the sovereign authority of the United States over its citizens in like circumstances.

313 U.S. at 78-79, 61 S.Ct. at 930, 85 L.Ed. at 1201.[21]

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[21] More recent Supreme Court citations to *THE HAMILTON* are ambiguous. In *Rodrigue v. Aetna*, *THE HAMILTON* was cited for the proposition that had offshore oil rigs been treated as vessels, the admiralty law "supplemented by the law of the jurisdiction of the vessel's owner" would apply to them. 395 U.S. at 355, 23 L.Ed.2d at 364. In *Moragne v. States Marine Lines*, however, the Court noted that

> The general understanding was that the statutes of the coastal States, which provided remedies for death within territorial waters, did not apply beyond state boundaries. This court had suggested, in an early case where the plaintiff and defendant were of the same State, that the law of that State could be applied to a death on the high seas, if the state intended its law to have such scope. *THE HAMILTON* . . .

398 U.S. at 393 n. 10, 90 S.Ct. at 1784 n. 10, 26 L.Ed.2d at 352 n. 10.

These passing references may have some academic interest, but are of little relevance to the concrete issue we must decide.

It has been suggested that *THE HAMILTON* may have been implicitly overruled by *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), and *Western Fuel Co. v. Garcia*, 257 U.S. 233, 42 S.Ct. 89, 66 L.Ed. 210 (1921). See *Wilson v. Transocean Airlines*, 121 F.Supp. at 91-92; Comment, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 Geo.L.J. 1411, 1423-24 (1971). *Jensen* is a celebrated and forceful statement of the doctrine that the provisions of state law may not interfere with the essential unity of federal maritime law. *Garcia* approved the use of a state statute when a death occurred on navigable waters *within* a state's territorial waters on the basis that the action was "maritime *and local* in character," and did not significantly threaten this unity. The argument that the *Jensen* doctrine and the "maritime and local" dicta in *Garcia* limit the power of a state to apply its laws to a high seas death might have some force were it not for section 7 of DOHSA and *Skiriotes v. Florida*. We note as well that *Jensen* itself cites *THE HAMILTON* in support of the proposition that one of the areas in which the states may legislate without infringing on the necessary maritime uniformity is that of wrongful death. 244 U.S. at 216, 37 S.Ct. at 529, 16 L.Ed. at 1098. *See also Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 435-36, 96 S.Ct. 2140, 2153-54, 48 L.Ed.2d 736, 755 (1976) (Stewart,

The statute involved in *Skiriotes* was criminal, but Justice Hughes' interpretation of *THE HAMILTON* makes it clear that this analysis of legislative jurisdiction is equally applicable to wrongful death statutes. Florida's interest in protecting the sponge fishery, in the absence of conflicting federal law, was sufficient to allow it to order the conduct of its own citizens on the high seas. Given a sufficient interest in a wrongful death occurring outside its territorial waters, and absent conflicting federal law, it follows that a state may also constitutionally apply its own law to order the rights of its citizens with regard to that death.

We note that both *THE HAMILTON* and *Skiriotes v. Florida* are careful to limit their analysis to the power of a state to attach legal consequences to the acts of their *own citizens* on the high seas.[22] As *Skiriotes* expressly notes, "No right of a citizen of any other state is here asserted. The question is solely between appellant and his own state." 313 U.S. at 76, 61 S.Ct. at 929, 85 L.Ed. at 1200. Fortunately, we are not compelled to explore the outer limits of a state's legislative jurisdiction over high seas occurrences since the significant contacts in this litigation are exclusively with Louisiana. Offshore Logistics is a Louisiana corporation and the helicopter was enroute to Houma, Louisiana at the time of the crash. Both decedents were Louisiana residents, and their work ac-

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J., dissenting) ("The Court has never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean 'territory.'")

[22] This is congruent with the conflict of laws principle that a state must have a sufficient interest in a particular transaction or occurrence to apply its own law. *Cf. Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981); *Clay v. Sun Insurance Office*, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed.2d 1170 (1960); *Home Insurance Co. v. Dick*, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930). *See generally*, Comment, *A Constitutional Analysis of the Mississippi Commercial Code Conflict of Laws Provision*, 53 Miss. L.J. 619 (1983).

tivities were centered around the Louisiana offices of the service companies by which they were employed. Both plaintiffs were also Louisiana residents at the time of the crash. In these circumstances, Air Logistics is clearly subject to the substantive law of Louisiana.

E. EXTRATERRITORIAL APPLICATION OF ART. 2315

What now remains is to determine whether as a matter of Louisiana law these plaintiffs have a claim under the Louisiana statute against this defendant. Article 2315 provides no clue as to whether it is intended to apply to deaths occurring on the high seas. Louisiana decisional law construing Article 2315 also furnishes no concrete guidance concerning whether that provision should have extraterritorial application. It is significant, however, that Louisiana will apply its tort law to an event or a transaction occurring in another state, if Louisiana has a sufficient interest in the transaction. *See Jagers v. Royal Indemnity Co.*, 276 So.2d 309, 313 (La. 1973); *Romero v. State Farm Mutual Automobile Insurance*, 277 So.2d 649, 651 (La. 1973). We also note that Louisiana applies its workmen's compensation law to employees meeting certain statutorily-defined conditions, even if the injury occurs in another state, a foreign country, or on the outer Continental Shelf. *See Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822, 823-25 (La. 1982); La. Rev.Stat. 23:1035.1. Workmen's compensation statutes and wrongful death statutes, broadly speaking, have the same purpose: to insure that injured individuals or their survivors are compensated. There can be little doubt that Louisiana has a strong interest in seeing that the survivors of its citizens killed by the fault of another are adequately compensated. It is most reasonable, unless the Louisiana courts or legislature indicate a contrary intent, to assume that the state intended the protection of this law to extend to its constitutional limits. This is

particularly so when, as in this case, none of the considerations of comity which influence choice of law in the interstate context are present.

F. RIGHT TO JURY TRIAL

Both Taylor and Tallentire demand a jury trial on their claims under the Louisiana death act. Since Taylor and Offshore Logistics are both Louisiana residents, Taylor's state law claim is cognizable in federal court either as an admiralty action or as a pendent claim to her DOHSA action. Since, in either instance Taylor's case would be in federal court solely by virtue of admiralty jurisdiction, Taylor has no right to a trial by jury.[23]

Since Tallentire and Air Logistics are citizens of different states, trial by jury will be available to Tallentire on her Louisiana death action. This is so whether Tallentire's claims are considered as based solely on the Louisiana statute or based on DOHSA *and* the Louisiana statute.[24]

II. DAMAGES

The district court accepted the projections made by Air Logistics' economist in computing the future earnings of each of the decedents. Taylor and Tallentire both contend their respective awards were inadequate, and contend that the district court erred in a number of respects in computing the awards. Since Tallentire's damage claims must be presented to a jury, we address only Taylor's complaints.

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[23] *E.g., Green v. Ross,* 481 F.2d 102 (5th Cir. 1973), *cert. denied,* 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973); *Ashland Oil v. Third Nat. Bank,* 557 F.Supp. 862 (E.D. Ky. 1983).

[24] *See Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963), *Cruz v. Hendy Inter. Co.,* 638 F.2d 719, 723 (5th Cir. 1981).

A. Social Security Taxes

In computing future earnings, the defendant's economist deducted social security taxes for the decedent's life span. Taylor in essence argues that social security payments are similar to payments to a pension plan, and that in any case social security deductions are matched by the employer's contribution, so there is no net loss of income. Although this argument has a certain amount of superficial appeal, our cases establish that social security taxes should be deducted in computing future earnings. *See Culver v. Slater Boat Co.,* 688 F.2d 280, 302 (5th Cir. 1982), modified in other respects *Culver v. Slater Boat Co.,* 722 F.2d 114 (5th Cir. 1983); *Madore v. Ingram Tank Ships, Inc.,* 732 F.2d 475, 479 (5th Cir. 1984).

B. Loss of Inheritance

The trial court also denied damages for loss of inheritance. This is a proper element of damages under DOHSA, *see Solomon v. Warren,* 540 F.2d 777, 790 (5th Cir. 1976), *cert. dismissed,* 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *National Air Lines, Inc. v. Stiles,* 268 F.2d 400 (5th Cir. 1959), *cert. denied,* 361 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1960), but should be awarded only when there is "a reasonable expectation of pecuniary benefit" or a "probability" that the claimed inheritance would have come to the plaintiff. *Solomon,* 540 F.2d at 790-91; *see also Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d at 81. In *Solomon v. Warren,* several factors were considered in determining whether a reasonable expectation of pecuniary benefit was present: (1) the existence of a will; (2) the fact that plaintiffs were actually legatees in the will; (3) the plaintiffs would be entitled to take under intestate succession even in the absence of a will; (4) the decedent had a history of accumulating property. 540 F.2d at 791. Taylor introduced no evidence of these or other factors which would

establish a sufficient probability of inheritance. In light of this, the district court's denial of this item as too speculative was well within its discretion.

C. Loss of Services

The district court also denied Taylor damages for loss of the services of her husband, because no evidence of the value of those services was introduced. Taylor's testimony that the decedent routinely performed repair work on the home and repaired the family automobiles was not contradicted; indeed we note that the defendant's post-trial brief conceded the propriety of damages for loss of services, seeking only to limit the amount. Damages of this sort are, by nature, not calculable with absolute exactness, and there is some merit to Taylor's contention that an expert's valuation of those services would be little better than that of anyone else. We remand this element for reconsideration and without intimating that those cases furnish the proper measure of damages, commend to the district court's attention *Consolidated Machines Inc. v. Protein Products Corp.*, 428 F.Supp. 209, 230 (M.D.Fla. 1976), and the district court's opinion in *Higginbotham v. Mobil Oil Corp.*, 360 F.Supp. 1140, 1144 (W.D.La. 1973), *reversed on other grounds* 545 F.2d 422 (5th Cir. 1977), *reversed and remanded*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978).

We have examined appellee's remaining assignments of error with regard to damages, and conclude that these decisions were within the trial court's discretion.

D. Cross Appeal by Air Logistics

Air Logistics has cross appealed, contending that the annual income figure used by the district court to calculate future earnings for Taylor was based on inadmissible testimony. A Mr. Verrett, the district manager of Halliburton, the decedent's employer, testified that figures supplied to him by the company showed that the

annual earnings of an employee in the positions to which the decedent would have been promoted were approximately $33,000 in 1981 and approximately $38,000 in 1982, including overtime. The base salary for employees in these positions was approximately $29,000 annually. Mr. Verrett also stated that he personally would have thought the figure would have been greater, perhaps $40,000 annually, but stated that any figure he gave would be a "guess." The district court used a $40,000 annual salary as the base for computing the decedent's future earnings. Air Logistics objects to the use of any figure other than the guaranteed salary testified to by Mr. Verrett, on the basis that the other figures are hearsay.

Whatever the merit of Air Logistics' argument that the figures supplied by Mr. Verrett are hearsay, the objection was not adequately preserved for appeal. Although Air Logistics' counsel made an initial objection that the average annual earnings of a special operator were not within Verrett's personal knowledge, plaintiff's counsel replied that he would "clarify that." Verrett then testified to the effect noted above, and defense counsel indicated no further objection to this testimony either then or in his cross-examination. The objection was never ruled upon, and Air Logistics' counsel indicated no dissatisfaction with the state of the record. Having given the trial court no reason to exclude this testimony as hearsay, the objection to the figures supplied by the company for base wages may not be pressed on appeal.[25] *Cf. Complete Auto Transit, Inc. v. Wayne Broyles Eng. Corp.*, 351 F.2d 478, 481-82 (5th Cir. 1965). We agree, however, that the $40,000 figure, which Mr. Verrett candidly stated was a guess, should not have been used to calculate the damage award. Use of a "guess" by a

[25] Since we remand for proceedings to determine other aspects of Taylor's damage award, the district court may wish to exercise its discretion to take additional evidence on this issue, if justice so requires.

witness as a basis for a damage award, when the witness himself states that other evidence is more accurate, is plain error affecting substantial rights. We therefore remand this aspect of Taylor's damage award for reconsideration by the district court.

CONCLUSION

The plain words of section 7 of DOHSA prevent the preemption by DOHSA of the Louisiana state death act. Our desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow the legislative will. We also conclude that Louisiana has the authority to apply its death act to its own citizens on the high seas adjacent to its shores and that as a matter of Louisiana law, plaintiffs may assert a claim under the Louisiana death act. Other than the amount of Taylor's annual earnings and the claim for loss of services by his survivors, we find no error in the trial court's computation of Taylor's award under DOHSA.

The judgment in *Taylor* is VACATED, however, for reconsideration of the above discussed items under DOHSA and for further proceedings necessary for the district court to consider plaintiff's claims for non-pecuniary losses under Article 2315 of the Louisiana Civil Code.

The judgment in *Tallentire* is VACATED and REMANDED for trial by jury.[26]

E. GRADY JOLLY, Circuit Judge, specially concurring:

I concur, but with no minor reservation. The result we reach in this case creates significant problems in the

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[26] All parties correctly assert that the district court should enter a judgment for a sum certain, rather than simply setting out the method by which damages are to be calculated. On remand, the district court should require the parties to provide the necessary assistance to permit it to enter judgments for a definite sum.

field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas. Most of these problems are noted in Judge Davis' thorough and honest opinion.

Notwithstanding the powerful reasons exhorting a result opposite the one we have reached, the language of the statute is plain and clear that state remedies for deaths on the high seas are preserved and not federally preempted, and there is legislative history that clearly supports the plain meaning of the plain words of the statute. I therefore concur, but knowing that this result may create a mess in more than a few cases.

GARZA, Circuit Judge, dissenting.

I respectfully dissent.

The majority begins with the proposition that section 7 of the Death on the High Seas Act (DOHSA) is "broad enough on its face" to permit a state wrongful death action for deaths occurring on the high seas. Indeed, read in a vacuum, section 7 does allow for such a construction. When read in the proper historical perspective, however, I believe that the majority's construction of section 7 is flawed.

Historically, state wrongful death actions provided the remedy for deaths occurring on territorial waters. Functionally, there was no remedy for deaths on the high seas. The absence of any remedy for deaths on the high seas was the primary purpose for the enactment of DOHSA. *See Moragne v. States Marine Lines*, 398 U.S. 375, 398, 90 S.Ct. 1772, 1786, 26 L.Ed.2d 339, 355 (1970). "The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the

Act preempted the entire field, destroying the state remedies that had previously existed." *Id.* In other words, section 7 preserved the then existing state law remedies available for deaths on territorial waters. It did not then, and does not now, expand the exclusive remedy created by DOHSA.

I am also compelled to dissent for the reasons expressed by the Ninth Circuit in *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (1983), in which the court held that DOHSA preempts state wrongful death statutes. Under the majority's opinion, state law is preempted by general maritime law on territorial waters, but operative on the high seas. This result is "as damaging to uniformity in wrongful death actions as it is illogical." *Id.* at 80.

For the foregoing reasons, I would affirm the district court's holding that DOHSA provided Taylor and Tallentire their exclusive remedy.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 81-4423 c/w 80-5015

SECTION "G"

BETH A. TALLENTIRE

versus

OFFSHORE LOGISTICS, INC., *et al.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, Beth A. Tallentire, brought this action as the personal representative of James Tallentire, her husband, under the Death on the High Seas Act, 46 U.S.C. § 761 et seq. to recover for damages she allegedly sustained when her husband died in a helicopter crash in the Gulf of Mexico.[1] The defendants in this action are Air Logistics, a Division of Offshore Logistics, Inc. (Air Logistics),[2] owner and operator of the helicopter that was transporting Mr. Tallentire from an oil rig located offshore of Louisiana in the Gulf of Mexico, and

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[1] The plaintiff originally asserted claims under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq. and the general maritime law as well. These claims were dismissed upon the defendants' motion for partial summary judgment which was heard on September 8, 1981.

[2] Plaintiff originally named Offshore Logistics, Inc. as defendant. She then amended her complaint to make Air Logistics, Inc. the defendant. The proper name of defendant, as indicated in its answer, is Air Logistics, a Division of Offshore Logistics, Inc.

Bell Helicopter Textron, Inc., the manufacturer of the helicopter.[3]

The Home Insurance Company intervened on the eve of trial to recover death benefits and funeral expenses it paid to plaintiff under an insurance policy issued to Mr. Tallentire's employer, Gator Hawk, Inc. (Gator Hawk).

The liability of Air Logistics was stipulated before trial. Defendant, Bell Helicopter, did not join in that stipulation, but agreed, by separate stipulation filed in the record, to pay any unsatisfied portion of any judgment that plaintff obtained against Air Logistics. No evidence of Bell Helicopter's liability was presented at trial.

The sole question for determination is the amount of damages to which the plaintiff is entitled as a result of the death of her husband.

The Death on the High Seas Act allows the personal representative of a decedent to maintain a suit for damages for "the exclusive benefit of the decedent's wife . . . against the [defendant] which would have been liable if death had not ensued." 46 U.S.C. § 761. Damages recoverable under DOSHA are limited to "a fair and just compensation for the pecuniary loss" sustained by the statutory beneficiaries, in this case, the plaintiff. 46 U.S.C. § 762.

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[3] Plaintiff also sued Avco Corporation, Avco Lycoming, Stratford Division (Avco), the alleged manufacturer of the helicopter engine that powered the aircraft. Avco filed a summary judgment motion based upon the complete absence of any evidence indicating that the engine manufacturer was at fault in this accident. After examination of the entire record and the deposition of the plaintiff's own aircraft expert, who concluded that the engine did not contribute to the crash of the helicopter, I decided that there was no genuine issue of fact regarding the fault of the engine manufacturer and granted Avco's motion for summary judgment on November 3, 1982. Avco was accordingly dismissed.

Trial on the issue of damages was held on November 16, 1982, following which counsel were invited to submit post-trial briefs on the economic theories underlying the testimony of their expert witnesses.

The plaintiff presented seven witnesses in addition to herself. She testified that she and her husband were married in December of 1978 and that they had no children. In November 1978, one month before they were married, they moved to Louisiana from Mt. Pleasant, Pennsylvania, where they had grown up together. They came to Louisiana because Mr. Tallentire could no longer find carpentry work in Pennsylvania. In mid-November of 1978, he found a job in Louisiana with Gator Hawk, Inc. (Gator Hawk), an external pipe testing company for the oil drilling industry.

Mrs. Tallentire testified that her husband was aggressive and ambitious in his employment with Gator Hawk. He sought overseas work with the company because the compensation was higher than domestic jobs. He left Gator Hawk in the spring of 1980 to find a higher paying position elsewhere, but eventually returned to the company. The testimony of Shelton LeBlanc, the business manager of Gator Hawk in Houma, Louisiana revealed that Tallentire left Gator Hawk for a period of three months between March 20, 1980 and June 13, 1980, but that he returned to the same position he held when he left.[4]

Mrs. Tallentire also testified that her husband planned to pursue his carpentry trade part-time while he worked for Gator Hawk but had not yet earned any compensation for carpentry work. Plaintiff testified further that her husband planned to build a house when the couple began

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[4] Review of the copies of income tax returns and W-2 forms introduced into evidence by plaintiff reveals that Mr. Tallentire worked for at least two other employers in 1980, Lafayette Well Testing and Teledyne Movible Offshore, Inc.

their family. No evidence, however, of the value of the part-time carpentry work which Mr. Tallentire planned to do, or of Mr. Tallentire's potential services in building his own home, was introduced.

Mrs. Tallentire testified that her husband spent little money on himself, owned no expensive clothes, and never took trips alone. He did, however, eat heartily when at home. She presented no other testimony, nor was any other evidence introduced, to establish the proportion of her husband's personal consumption in relation to the family income.

The remainder of Mrs. Tallentire's testimony concerned her depressed mental state following her husband's death, and her inability to retain a job. Since the Death on the High Seas Act allows recovery of only pecuniary losses, and since the pecuniary losses do not depend upon whether or not a statutory beneficiary can provide her own support, this testimony is not relevant to the present action.

Billy Romero, the assistant manager of Gator Hawk and Mr. Tallentire's superior at the company, testified with regard to Mr. Tallentire's employment. He said that Tallentire began at Gator Hawk as a junior operator testing pipe at various locations both on and offshore of Louisiana. He stated further that Tallentire was promoted from junior to senior operator, the next step in the Gator Hawk hierarchy, after working at the company for three or four months. In Mr. Romero's opinion, Tallentire had good potential for advancement. However, he gave no testimony regarding other promotions available to Mr. Tallentire, or the salaries that he could expect in the future.

Shelton LeBlanc, the business manager of Gator Hawk, testified that Tallentire earned an hourly wage of $5.80 while working as a senior operator between June 13, 1980, the date he returned to work for Gator Hawk,

until the date of his death on August 6, 1980. However, Mr. LeBlanc did not state the number of hours Mr. Tallentire worked during that period, nor the total wages paid to him by Gator Hawk. The wage of senior operators, as of the trial date, was $7.45 per hour.

Mr. LeBlanc testified that the average annual earnings of three employees who are "equivalent" to Mr. Tallentire and who earned the same hourly wage was $30,063 in 1981, and $34,263 in 1982. The three employees were selected, and the calculations made, by someone other than Mr. LeBlanc. LeBlanc had no personal knowledge of who the three employees were nor how their positions at the company compared to Mr. Tallentire's. I find that plaintiff has failed to prove through this hearsay testimony that decedent would have earned the amounts that LeBlanc asserted were the average earnings of the 'equivalent' employees.

LeBlanc also testified that Gator Hawk had a profit sharing plan to which the company made voluntary contributions. In 1980, the company contributed to the plan in an unspecified amount. During the last two years, however, Gator Hawk has not contributed any funds to profit sharing. The evidence, therefore, does not support a finding of pecuniary loss to the plaintiff from the profit sharing plan.

Finally, Mr. LeBlanc related that Gator Hawk paid the premiums for group hospitalization insurance of their employees. The company did not, however, pay the premiums to provide coverage to dependents of employees; the employees themselves paid the premiums to obtain coverage of their dependents. The insurance policy of James Tallentire, introduced into evidence as Exhibit 4, indicated that Beth Tallentire was covered under the group policy, but she is no longer eligible for that coverage.

Mr. John Schiffbaum of Washington National Insurance Company testified that participation in a group

policy, as opposed to an individual policy, saves the insured 30 to 40% in premiums. He selected an individual policy to replace plaintiff's coverage under the Gator Hawk group policy, and estimated that it would cost $750.00 per year more for her to obtain individual coverage.

The decedent's father, James W. Tallentire, described in general terms his son's abilities as a carpenter and his desire to build a home in the future. The father also described his own estate, consisting of property worth $40,000, three vehicles, and investments valued at $30,000. He had intended to leave the entire estate to his son, but upon his death had altered his will and made his sister and wife's brother the beneficiaries. No evidence was introduced which would indicate that the father's estate would have gone in part to Beth Tallentire, or that, assuming that the father had died and given it to his son, Beth Tallentire would have outlived her husband and received the value of the estate through her husband's will. Plaintiff, therefore, did not establish that the loss of the value of the decedent's father's estate was a pecuniary loss resulting from her husband's death.

Robert Morton, of Breaux Bridge, Louisiana, testified that Mr. Tallentire was building a hunting cabin for a small hunting club during his time off. Although Mr. Morton was very pleased with Tallentire's work, he was not compensating him. Instead, Mr. Morton intended to allow Tallentire to use the lodge as a "guest" of the club. No evidence of the value of this guest privilege was introduced.

The plaintiff's final witness was Donald Woodward Cornwell, assistant professor of econmics and finance at the University of Southwestern Louisiana in Lafayette. Professor Cornwell's qualifications as an expert economist were stipulated.

Professor Cornwell testified to the loss of support to plaintiff resulting from the death of her husband. To

calculate Mr. Tallentire's future lost wage income over the 34.7 year work life expectancy from the date of death, Cornwell used a base wage of $23,820.22 which he derived from Tallentire's gross earnings in the twelve months before his death evidenced by W-2 forms of his various employers. He testified that the wages Tallentire earned at Gator Hawk would continue to grow at 6.99%, the average annual growth rate in the compensation of petroleum mining workers in Louisiana between 1960 and 1981. After reducing Mr. Tallentire's projected wage income by the amount he would have paid in income tax, Mr. Cornwell reduced the net income by 20%, the amount he estimated Mr. Tallentire would have consumed himself.

Professor Cornwell included in his calculations of lost support an estimated value of Mr. Tallentire's carpentry skills which he valued at the time of his death to be $10 per hour for 10 hours per week at the date of death, $12.00 per hour at the date of trial, and increasing at the rate of 7.01% in the future. He also included what he termed "the annual value to replace lost medical insurance," increasing at 8.04% annually to reflect the increase in the cost of medical care.

Professor Cornwell estimated the total loss of support from the date of Tallentire's death to the date of trial, including lost wages, lost value of Mr. Tallentire's carpentry skills, and the lost value of the group health insurance to be $55,536.84. This amount was not discounted to present value.

Because money received today can be invested and earn interest, a sum of money received today is more valuable than the same amount received at some date in the future. Since an award of damages to compensate for loss of support to the plaintiff in the future requires that payment be made today, the award must be discounted, or reduced, by the interest rate at which plain-

tiff could invest the funds until the loss would actually have been sustained in the future.

With respect to the discount of his estimate of loss of support after the date of trial, Professor Cornwell testified that government securities without risk paying 7% interest were available for purchase. However, he discounted the total lost wage at a rate of 5.79%, which he described as the appropriate effective discount rate in light of what he called a "high yield excess problem" and the taxes which would be levied on the interest earned by the government securities.[5]

Professor Cornwell testified that the total discounted loss of support, assuming that Mr. Tallentire worked for Gator Hawk for the duration of his work life expectancy, would be $1,092,678.45, and if he worked for the duration of his life expectancy, the total discounted loss would be $1,593,837.00. However, there is no evidence to indicate that Mr. Tallentire, an hourly wage earner who was not self-employed, would have or could have worked at Gator Hawk beyond his work life expectancy.

Professor Cornwell made an alternative calculation of lost wage income based upon the average earnings of the three "similar" Gator Hawk employees mentioned by Shelton LeBlanc. Based upon gross earnings of $32,363.00 in 1981, and annulized earnings of $39,167.00 in 1982, he calculated the discounted value of the total loss of support increased by $259,944.30, for a total of $1,352,622.75.

The defendant presented only one witness, its expert economist, Dr. Kenneth Boudreaux. Dr. Boudreaux also

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[5] During trial, I requested that both parties submit post trial memoranda explaining the methods used by their economic experts in calculating the lost support and in discounting to present value. Neither party did so. Both submitted memoranda which merely repeated the assumptions used by each economist and the end result which each produced.

testified to the loss of support suffered by Mrs. Tallentire. From the decedent's W-2 forms from Gator Hawk, he estimated the decedent's base wage in the income year before his death to be $21,850.21. He calculated lost wages using the actual percentage increase in Gator Hawk wages until November 1982, the date of trial, and alternative inflation rates of 3%, 5.3% and 6% after that date. I adopt 6% as the appropriate rate of inflation to be applied to the future lost wages in this case.

Dr. Boudreaux testified that in calculating the lost wages of the decedent he reduced the gross wage figure by amounts which would have been paid as income taxes and social security contributions. He then reduced this net amount of lost wages by 34%, the amount which Mr. Tallentire would have consumed himself. Dr. Boudreaux based this estimate of personal consumption upon the average of two statistical surveys, the Chite study of family consumption and the National Bureau of Labor Statistics survey known as the "Revised Equivalency Scale." He stated that 34% was the average from the two studies of the personal consumption of the wage earner in an American family with no children.

Dr. Boudreaux did not testify to the total value of loss of support before discounting. He stated that government securities paying 10.25% interest were available for purchase and that 10.25% was the proper rate of discount to present value of future loss. Applying that discount, Dr. Boudreaux calculated the lost support from the date of death to be $265,109.99.

For the reasons hereinafter set out, I find more support in the record of this case for Dr. Boudreaux's calculations than for Professor Cornwell's. Moreover, they are more appropriate in light of the governing law as explained most recently in *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). Dr. Boudreaux's testimony is

preferred over Professor Cornwell's because Professor Cornwell failed to consider several significant factors which must be included in calculating the loss of support.

First, Dr. Boudreaux applied a 6% inflation rate in determining lost wages after November, 1982, rather than the 6.99% rate used by Professor Cornwell. Professor Cornwell testified that 6.99% was the appropriate inflationary increase because it was the average increase of oil field workers' wages in Louisiana over the last 20 years. Dr. Boudreaux responded by pointing out that the average wage increase in this industry was inflated as a result of the recent explosive expansion of the industry, and that the increases were not long-term inflationary rates, but rather, were peculiar to the period of time involved. Given the more recent decline in demand for oil, Dr. Boudreaux stated that the more appropriate rate of increase would be 6%, the maximum average wage increase due to inflation over the long term for American wage earners generally. I agree with Dr. Boudreaux, and find that 6% is the more appropriate rate of inflation to be applied in estimating lost wages from Mr. Tallentire's employment at Gator Hawk over a period of more than thirty years.

Second, Professor Cornwell failed to deduct social security contributions. He asserted that such a deduction would not be appropriate since the employer's contributions would offset the payments which came out of decedent's paycheck. Dr. Boudreaux testified that because the social security contributions are used to fund payments made to current social security recipients, and create no actuarial right to receive benefits in the future, they must be treated like an income tax in determining pecuniary loss. Therefore, the fact that the employer matches the contribution is irrelevant to whether it is a pecuniary loss.

Dr. Boudreaux's opinion regarding the nature of the social security contribution finds support in the law in *Culver*. Though the point was not explicitly decided in *Culver*, the court demonstrated in dicta that social security contributions were similar to taxes and were to be deducted from any calculation of damages due to lost wages. In explaining the mechanics of the lost wage income computation in its holding that inflation could be considered by a fact finder where evidence of it is properly presented, the court stated:

> First, assume that a plaintiff is totally and permanently disabled and that after allowable deductions for income taxes, *social security taxes*, and union dues . . . his/her loss of future earnings would be $10,000 per year for the balance of a worklife expectancy of 18 years, or a gross expectancy of $18,000 [*sic*].

Culver, 688 F.2d at 302 (emphasis added).

Third, I find Dr. Boudreaux's use of a personal consumption figure of 34% more appropriate than Professor Cornwell's estimate of 20%. Professor Cornwell stated that 34% was not representative of Tallentire's personal consumption, since he spent much of his time at work where his meals were provided. Plaintiff, however, testified that her husband "ate a lot" when he was at home, a fact which Dr. Boudreaux used to justify the use of the established statistical consumption figure. I find that there is insufficient evidence in the record to rebut the statistical figures underlying the testimony of Dr. Boudreaux in this regard.[6]

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[6] This conclusion is limited to the presentation of the evidence in this case. I by no means assert that the statistical evidence used by Dr. Boudreaux could not be overcome by a demonstration in a particular case that the wage earner's personal expenses were smaller, or that certain shared, fixed expenses consumed a large part of the family budget. In this case, plaintiff simply failed to make that demonstration sufficiently by presenting the court with some tangible evidence of Mr. Tallentire's personal consumption.

Fourth, Professor Cornwell included the value of Tallentire's carpentry skills in determining loss of support. Because I find that plaintiff has failed to establish that Tallentire's carpentry provided any pecuniary benefits to the family, it cannot be considered in estimating loss of support.

Finally, Professor Cornwell failed to apply any discount to lost support between the date of death and the date of trial. Anticipating the question presented here, *Culver* teaches that

> [i]n those instances where the substantive law permits a court to award pre-judgment interest, the court *must* discount the *damage figure* back to the date of the event, i.e. the injury or death, and may award pre-judgment interest for the period between the event and judgment.

688 F.2d at 311 (emphasis added). *Culver*'s rationale in discounting to the date of death remained unexplained. However, Dr. Boudreaux testified that discounting to the date of death is economically appropriate, since the plaintiff should be awarded as damages her pecuniary loss as of the date of death, that is, the amount of money which could have been invested at the date of death at the discount rate to produce her pecuniary loss as a result of the death. The award of pre-judgment interest would then compensate her for the loss of the use of that money between the date of death and the date of trial. Since pre-judgment interest may and will be awarded here, *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1958), *cert. denied* 361 U.S. 885 (1959), Dr. Boudreaux's calculations are more appropriate.

Dr. Boudreaux failed, however, to include in his estimate of loss of support the increased cost to plaintiff of obtaining health and hospitalization insurance. His calculation, therefore, must be adjusted upward consistent with my finding that plaintiff suffered a pecuniary loss

of $750 per year for the duration of decedent's worklife expectancy as a result of the lost opportunity to participate in the Gator Hawk group policy.

Accordingly, having considered the evidence presented at trial, the memoranda of counsel, the law applicable to the case, and the entire record of this proceeding, I now make the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, Beth A. Tallentire, was the wife of James D. Tallentire at the time he died in a helicopter crash in the Gulf of Mexico on August 6, 1980, and is the proper party plaintiff in this action.

2. Defendant, Air Logistics, a Division of Offshore Logistics, Inc. (Air Logistics), owned, maintained and operated the helicopter in which James Tallentire was a passenger at the time of his death.

3. Defendant, Bell Helicopter Textron, Inc., was the manufacturer of the helicopter in which plaintiff's husband was killed.

4. Air Logistics is liable to the plaintiff under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, for the pecuniary loss to her resulting from this helicopter casualty.

5. No evidence was presented by plaintiff regarding the liability of defendant Bell Helicopter. Plaintiff has therefore failed to carry her burden of proving by a preponderance of the evidence that Bell Helicopter is liable to her for the death of her husband.

6. Plaintiff and James Tallentire were married on December 13, 1978. They had no children.

7. James Tallentire was born on November 2, 1956. At the time of his death, his work life expectancy was 34.7 years.

8. At the time of his death, Mr. Tallentire was employed by Gator Hawk, Inc. (Gator Hawk), a company engaged in the external testing of pipe used in the oil exploration industry.

9. Mr. Tallentire was first hired by Gator Hawk in November of 1978 as a junior operator. He was promoted to senior operator on September 5, 1979.

10. On March 20, 1980, Mr. Tallentire left Gator Hawk to look for a position elsewhere. Before returning to Gator Hawk to his position as a senior operator on June 13, 1980, he worked for at least two other companies, Lafayette Well Testing and Teledyn Movible Offshore, Inc.

11. At the time of his death, Mr. Tallentire was earning an hourly wage of $5.80 as a senior operator at Gator Hawk.

12. No evidence, other than the testimony of the economic experts, was presented to establish Mr. Tallentire's income in the year preceding his death or what his income would have been had he worked for Gator Hawk continuously during that year. Nor is there any evidence regarding the number of hours Mr. Tallentire worked during an average period of time at Gator Hawk. I cannot determine from the tax returns submitted by plaintiff in evidence as Exhibit 1 what Mr. Tallentire's annualized earnings from Gator Hawk were in the year before his death. Accordingly, consistent with the testimony of Dr. Boudreaux, I find that Mr. Tallentire's annualized earnings from Gator Hawk in the year preceding his death would have been $21,850.21.

13. The rate of pay for senior operators increased to $6.00 per hour on December 28, 1980. On December 28, 1981, the hourly wage for senior operators increased to $6.95. Again, in July of 1982, the wage rate was increased to $7.45.

14. Mr. Tallentire enjoyed working at Gator Hawk and sought overseas assignments to earn a greater rate of pay. He was an energetic and eager employee. No evidence was introduced, however, to show that Mr. Tallentire would have been promoted to a position higher than senior operator. I find, therefore, that Mr. Tallentire would have remained in the employ of Gator Hawk as a senior operator for the duration of his work life expectancy.

15. The rate at which Mr. Tallentire's salary as a senior operator could reasonably have been expected to increase in the future as a result of inflation is 6% per year.

16. The present value of the loss of support resulting from the loss of wages which Mr. Tallentire would have earned at Gator Hawk, discounted to the date of death, is $265,109.99.

17. In addition to regular salary benefits, Gator Hawk provided a group health insurance policy. Mrs. Tallentire was insured under this policy, but the premiums were paid by Mr. Tallentire, not Gator Hawk. The cost of obtaining health insurance on an individual basis is $750 per year greater than the cost of participating in the Gator Hawk group policy. Plaintiff therefore suffered a pecuniary loss of $750 per year, increasing at the 6% rate of inflation applicable in this action, for the remainder of the worklife expectancy of the decedent as a result of the lost opportunity to participate in the Gator Hawk health plan.

18. Although the evidence demonstrated that Mr. Tallentire was a capable carpenter, it was insufficient to show that he received any pecuniary benefit from his carpentry work. Likewise, although Mr. Tallentire planned to build a house in the future, no evidence of the value of these services was presented. Accordingly, I find, that no pecuniary loss resulted from the loss of these services.

19. Intervenor, Home Insurance Company, had in full force and effect on August 6, 1980, a policy of insurance providing coverage under the Longshoremen and Harbor Workers' Compensation Act issued to Gator Hawk and covering James Tallentire.

20. As a result of Mr. Tallentire's death, the Home Insurance Company paid to the plaintiff, Beth Tallentire, reasonable funeral expenses in the amount of $1000.00 and death benefits in the amount of $30,522.10. (Stipulation and Agreement of the Parties, November 15, 1982).

Conclusions of Law

1. This Court has jurisdiction of this wrongful death action. 28 U.S.C. § 1333.

2. This action is brought under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

3. Liability is admitted by defendant Air Logistics. Accordingly, it is legally responsible for the pecuniary damages permitted under DOHSA to plaintiff.

4. No evidence of the liability of defendant Bell Helicopter Textron, Inc. exists in the record. Accordingly, the plaintiff's claims against Bell Helicopter must be dismissed.

5. DOHSA permits an action for damages by the personal representative of the decedent. Plaintiff, Beth A. Tallentire, widow of the decedent, is the personal representative. The recovery in a suit under DOHSA "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. § 762.

6. Pecuniary losses recoverable under DOSHA by the plaintiff are loss of support due to the lost wage income, loss of the value of services which decedent contributed to the plaintiff, and reasonable funeral expenses. *Mascuilli v. U.S.*, 343 F. Supp. 439 (D.C. Pa. 1972), *reversed on*

other grounds, 483 F.2d 81 (3rd Cir. 1973). Pecuniary loss is not restricted to net income or net earnings, but refers to the reasonable expectation of pecuniary benefits which would have flowed from the continued life of the deceased. *Noel v. United Aircraft Corp.*, 342 F.2d 232 (4th Cir. 1964).

7. Damages may not be awarded under DOHSA by resort to speculation or conjecture in determining whether the loss was in fact sustained. *Union Oil Co. of California v. Hunt*, 111 F.2d 269, 277-78 (9th Cir. 1940); *First National Bank in Greenwich v. National Airlines, Inc.*, 171 F. Supp. 528, 537 (S.D.N.Y. 1958). There must be evidence of the existence and extent of damages.

8. In determining loss of future financial support resulting from the loss of the decedent's income and benefits from employment, the court must consider: (1) the work life expectancy of the deceased, (2) his gross earnings at the time of his death, and his earnings history, (3) deductions from his gross earnings for federal and state income taxes, social security taxes, and union dues, (4) additions to his gross income for fringe benefits, where appropriate, (5) potential increases to the deceased's earnings based on inflationary trends, productivity or merit, (6) additional increases in earnings due to promotion to a higher level of responsibility, (7) appropriate deductions for other personal consumption of the deceased, and (8) the appropriate discount to be applied which reflects the rate of return which might be expected from investing in risk-free government securities requiring no investor sophistication. *Culver v. Slater Boat Co.*, 688 F.2d 280, 302-306 (5th Cir. 1982).

9. Although some courts have used a decedent's life expectancy to estimate future lost wages, *see, e.g., National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1958) (future earnings of decedent, a lawyer, calculated to life expectancy), no evidence in this case indicates that Mr. Tallentire would or could have continued to work at Gator

Hawk beyond his work life expectancy. Nor does any evidence support an award for loss of retirement benefits. *See Cox v. Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967).

10. Awards for pecuniary loss under DOHSA must be discounted to their present value. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982); *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967). In this case, the appropriate rate of discount is 10.25%.

11. Where the substantive law permits an award of pre-judgment interest, any award for loss of pecuniary benefits must be discounted back to the date of the loss, in this case, the date of Mr. Tallentire's death. *Culver*, 688 F.2d at 311. Pre-judgment interest may be awarded for the period between the date of death and the date of judgment in claims under the Death on the High Seas Act. *Culver*, 688 F.2d at 311, n.50; *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1958), *cert. denied* 361 U.S. 885 (1959).

12. The lost support to plaintiff resulting from lost wages from Gator Hawk is $265,109.99. This amount is the present value of the stream of lost support income from Mr. Tallentire's employment at Gator Hawk which would have been available to the plaintiff had her husband lived, discounted to the date of his death at the rate of 10.25 percent.

13. As a result of the lost opportunity to participate in the Gator Hawk group health policy, plaintiff suffered pecuniary loss from the date of death of $750 per year for the duration of her husband's worklife expectancy. This amount also must be increased yearly by the 6% inflation rate applicable to this case, and discounted at the rate of 10.25%.

14. The award of damages for lost support to plaintiff must be reduced by the amount paid in death benefits to plaintiff by intervenor, Home Insurance Company, under

the liability policy issued to Gator Hawk, $30,522.10. *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 588 (2nd Cir. 1961).

15. Pre-judgment interest is awarded from the date of death until the date of judgment at the rate of 10.25 percent, the rate at which the award for pecuniary loss was discounted. A court sitting in admiralty is not required to fix the pre-judgment interest rate at the legal rate provided by the statutes of the state in which it sits. *Federal Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980); *Complaint of M/V Vulcan*, 553 F.2d 489, 491 (5th Cir. 1977); *Sea-Land Services, Inc. v. Eagle Terminal Tankers, Inc.*, 443 F. Supp. 532, 534 (W.D.Wa. 1977). The purpose of awarding pre-judgment interest is to insure that the injured party is fully and fairly compensated for its losses and to restore the party to the position it would have been in but for the pecuniary losses. *Federal Barge Lines*, 616 F.2d at 373; *Complaint of M/V Vulcan*, 553 F.2d at 491. In this case, pecuniary losses were calculated as of the date of trial, but were discounted in accordance with the Fifth Circuit's decision in *Culver*, 688 F.2d at 311, to the date of death at the rate of 10.25 percent. The discounted award represents that amount which would have produced the lost stream of income if it had been invested upon the date of Mr. Tallentire's death. Since I found that 10.25 percent was the rate at which the funds could have been invested, and discounted accordingly, the award of pre-judgment interest at the same rate until the date of judgment is most appropriately applied to fairly compensate the plaintiff for the lost use of the money between the date of death and the date of judgment.

16. Home Insurance Company is entitled to receive as damages from the defendant the amounts it paid in funeral expenses and death benefits to the plaintiff under the policy it issued to Gator Hawk, a total of $31,552.10.

17. Post-judgment interest is awarded in accordance with 28 U.S.C. § 1961.

Let judgment be entered accordingly.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-5015, c/w 80-5017

SECTION "G"

CORINE ANN SOUDELIER TAYLOR, ETC., *et al.*

versus

AIR LOGISTICS, INC.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, Corine Ann Taylor, brought this action as the personal representative of Michael Taylor, her husband, under the Death on the High Seas Act, 46 U.S.C. § 761 et seq., to recover for damages allegedly sustained as a result of her husband's death in a helicopter crash in the Gulf of Mexico.[1] Plaintiff sues in behalf of herself and her minor daughter. The defendants in the action are Air Logistics, Inc., a Division of Offshore Logistics, Inc. (Air Logistics), owner and operator of the helicopter that was transporting Mr. Taylor from an oil rig located offshore of Louisiana in the Gulf of Mexico, and Bell Helicopter, Textron, Inc. (Bell Helicopter), the manufacturer of the helicopter.[2]

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[1] The plaintiff originally asserted claims under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* and the general maritime law as well. These claims were dismissed upon the defendants' partial summary judgment motion which was heard on September 8, 1982, leaving DOHSA as the plaintiff's sole remedy.

[2] Plaintiff also sued Avco Corporation, Avco Lycoming, Stratford Division (Avco), alleged to have been the manufacturer of the

Halliburton Services, a Division of Halliburton Company (Halliburton Services), Mr. Taylor's employer, intervened to recover survivor benefits it paid to Mrs. Taylor as a result of her husband's death.

The liability of Air Logistics was stipulated before trial. Defendant Bell Helicopter did not join in that stipulation, but agreed, by separate stipulation filed in the record, to pay any unsatisfied portion of any judgment that plaintiff obtained against Air Logistics. No evidence of Bell Helicopter's liability was presented at trial.

The sole question for determination is the quantum of damages to which the plaintiff is entitled as a result of the death of her husband.

DOSHA allows the personal representative of a decedent to maintain a suit for damages for "the exclusive benefit of . . . [his] wife, . . . parent, child, or dependent relative against the . . . [defendant] which would have been liable if death had not ensued." 46 U.S.C. § 761. Damages which are recoverable under DOSHA are limited to "a fair and just compensation for the pecuniary loss" sustained by the statutory beneficiaries, in this case, plaintiff and her daughter. 46 U.S.C. § 762.

Trial on the issue of damages was held on November 16, 1982, following which counsel were invited to submit post-trial briefs on the economic theories underlying the testimony of their expert witnesses.

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helicopter engine that powered the aircraft. This defendant filed a summary judgment motion based upon the complete absence of any evidence indicating that the engine manufacturer was at fault in this accident. After examination of the entire record and the deposition of the plaintiff's own aircrash expert, who testified that the engine did not contribute to the crash of the helicopter, I concluded that there was no genuine issue of fact regarding the fault of the engine manufacturer and granted its motion for summary judgment on November 3, 1982. Avco was accordingly dismissed.

The plaintiff presented two witnesses in addition to herself in support of the damage claim, Mr. Ronald Verrett, the Assistant District Manager of Halliburton, Mr. Taylor's employer, and Dr. Seymour Goodman, an expert economist.

Mrs. Taylor testified that she and Mr. Taylor had been married since 1967; that they lived in Houma, Louisiana; that they had one daughter, Leslie Ann, who was ten years of age at the time of her father's death; that her husband had worked for Halliburton since 1971; and that he intended to remain at the company until retirement. His job entailed working several days at a time away from home, but when he was home he spent most of his time with his daughter or doing household tasks, such as the family financial matters or household and automobile repairs. According to Mrs. Taylor, they planned to send Leslie Ann to college.

No evidence was presented regarding the value of the household services which Mr. Taylor performed. Moreover, while Mrs. Taylor asserted that her husband spent little money on himself, as opposed to his family, no evidence of the extent of the expenditures personal to the decedent was produced at the trial.

Mr. Verrett testified concerning the decedent's employment potential at Halliburton.

At the time of his death, Mr. Taylor held the position of 'cementer,' earning $2,115.00 per month, was well thought of by his superiors and was a likely candidate for promotion to the position of 'tool operator,' the next step in progression through the Halliburton ranks. According to Verrett, a 'tool operator' earned an average of $33,295.00 in 1981. Mr. Verrett testified that from 'tool operator,' an employee normally progressed to 'special operator' after at least six months. He was optimistic about Mr. Taylor's chances of promotion to 'special op-

erator,' a position which paid, on average, $38,000 in 1981.

Mr. Verrett gave no testimony regarding employment in positions above that of 'special operator,' nor did he express any opinion about any further chances of promotion for Taylor.

Dr. Goodman testified concerning plaintiff's loss of support resulting from the loss of earnings and employment benefits which Mr. Taylor would have received from Halliburton had he lived. His computation included both wage benefits and the benefits which Mr. Taylor would have received from the Halliburton profit sharing plan, a fund to which Halliburton made yearly contributions of 13.6% of an employee's base wage and which vested in the employee upon retirement.

In making his calculations, Dr. Goodman assumed that Mr. Taylor's wage base would have increased yearly at a rate of 5.3%, the average annual increase in Halliburton wages between 1950 and 1981. He also deducted those amounts which would have been paid in income taxes. Finally, Dr. Goodman reduced the decedent's after tax wage income by the percentage which decedent would have consumed himself, and which therefore would have been unavailable for the support of the family. Dr. Goodman estimated this personal consumption to be 20%.

Dr. Goodman made two alternative calculations of loss of support. In the first, he assumed that Mr. Taylor would have been a tool operator at Halliburton in 1981, and used $33,295, the 1981 salary of tool operators at Halliburton, as the base wage in estimating total lost wages. In the second, he assumed that beginning in 1981 Mr. Taylor would have been a special operator, and used $38,000 as the base wage.

Because money received today can be invested and earn interest, a sum of money received today is more valuable than the same amount received at some point in

the future. Since an award of damages to compensate for loss of support to the plaintiff in the future requires that payment be made today, the award must be discounted, or reduced, by the interest rate at which plaintiff could invest the funds until the loss would actually have been sustained in the future.

In both calculations, Dr. Goodman discounted the wages lost after the date of trial at the rate of 10 and ⅜ percent. With respect to the loss of support from wages lost between the date of death and the date of trial, Dr. Goodman did not discount that at all.

Dr. Goodman testified that if Mr. Taylor were a tool operator in 1981, the loss of support resulting from lost wage income to Mr. Taylor between the date of death and the trial date would have been $59,625, and that the discounted prospective loss of support from lost wages after the trial date would have been $497,951.91, for a total loss of support of $557,576.91. In the alternative, he testified that if Mr. Taylor would have been a special operator in 1981, the loss of support between the date of death and the date of trial would have been $61,196.09, and that the discounted prospective loss of support after the trial date would have been $570,477.19, for a total loss of support of $631,673.28.

The defendant presented only one witness, Dr. Kenneth Boudreaux, also an expert economist. Like Dr. Goodman, Dr. Boudreaux assumed Mr. Taylor's base wage would have increased at an annual rate of 5.3%. However, he testified that government securities paying 10.25% interest were available to purchase and that 10.25% was a proper rate of discount to present value of future loss. Applying that discount, Dr. Boudreaux calculated lost support from the date of death from Mr. Taylor's wage income to be $274,857.73. To this he added lost support attributable to the lost profit sharing plan benefits which he estimated to be $35,586.57, for a total loss of support of $310,444.30.

Unlike Dr. Goodman, in arriving at his calculation of lost wage income Dr. Boudreaux deducted not only income tax but also the contribution Mr. Taylor would have made toward social security of approximately 6%. He also considered the portion of income which would have been consumed by Mr. Taylor alone, by applying two statistical surveys, the so-called Chite study, and the Bureau of Labor Statistics study known as the 'Revised Equivalency Scale.' These surveys include an average percentage of total family income which is consumed by the wage earner alone in the average American family. Based on the average of these two statistical surveys, Dr. Boudreaux assumed that the decedent's personal consumption during the time his daughter remained at home and dependent on the family income would have been 27%, and that after she reached the age of 21, and would no longer be dependent on family support, his personal consumption would have increased to 34%.[3] The percentage of personal consumption was also deducted from the projected loss from the profit sharing plan.

Because the Halliburton profit sharing plan vests upon retirement and no benefits are received until the employee stops working, the entire sum of the contributions made by Halliburton were discounted by Dr. Boudreaux over the remaining work life expectancy of the decedent as of the date of his death.

Due to the variance in the testimony of the economic experts, which was not adequately explained during trial, I requested that each party submit post-trial memoranda on the economic theories of their respective experts. Un-

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[3] Dr. Boudreaux made calculations assuming that Leslie Ann would no longer be dependent on the family's support at both ages 18 and 21. Because I find that she may likely go to college, the calculation which assumes that she will become independent of family support at age 21, rather than 18, is more appropirate in this situation. Accordingly, references to Dr. Boudreaux's testimony are based upon this assumption.

fortunately, neither party complied with this request; both submitted memos which assailed the other's expert's assumptions, but neither discussed the economic basis of the expert's testimony.

For the reasons hereinafter set out, I find more support in the record of this case for Dr. Boudreaux's assumptions than for Dr. Goodman's. Moreover, they are more appropriate in light of the governing law of this case as set out most recently in *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). His testimony is preferred over Dr. Goodman's because Dr. Goodman failed to consider several significant factors which must be included in calculating the future lost wages in this case.

First, Dr. Goodman failed to account for Mr. Taylor's contributions to social security. Social security is a tax which creates no right to receive a calculable economic benefit in the future. According to Dr. Boudreaux, since the contribution creates no pecuniary benefit which can now be estimated, it must be regarded simply as a deduction from the decedent's pay which is unavailable as support to the plaintiff.

Dr. Boudreaux's opinion regarding the nature of the social security contribution finds support in the law in *Culver*. Though the point was not explicitly decided in *Culver*, the court demonstrated in dicta that social security contributions were similar to taxes and were to be deducted from any calculation of damages due to lost wages. In explaining the mechanics of the lost wage income computation in its holding that inflation could indeed be considered by a fact finder where evidence of it is properly presented, the court stated:

> First, assume that a plaintiff is totally and permanently disabled and that after allowable deductions for income taxes, *social security taxes*, and union dues . . . his/her loss of future earnings would

> be $10,000 per year for the balance of a worklife expectancy of 18 years, or a gross expectancy of $180,000. (emphasis added).

Culver, 688 F.2d at 302.

Second, although the plaintiff argued forcefully that Dr. Boudreaux's use of the average personal consumption derived from the Chite study and the 'Revised Equivalency Scale' was inappropriate, no evidence was offered to corroborate or support Dr. Goodman's opinion that the Chite study was outmoded. The mere assertions by the plaintiff that her husband did not spend much money on himself and the conclusion of Dr. Goodman that since Mr. Taylor was an oil worker many of his personal needs would be cared for at company expense during his long hours at work, are insufficient to rebut the statistical evidence supplied by the defendant's expert.[4] For this reason, I accept Dr. Boudreaux's use of personal consumption estimates based upon the Chite study and the 'Revised Equivalency Scale' as more appropriate.

Third, Dr. Goodman's calculation of the present value of Mr. Taylor's benefits under the Halliburton profit sharing plan is deficient. The plan vests upon retirement. At that time, the income is received from the fund and a portion of it too must be attributed to the personal consumption of Mr. Taylor. Dr. Boudreaux assumed that Taylor would have consumed 34% of that money himself, after deductions for taxes. Dr. Goodman, however, neglected to adjust the profit sharing plan benefits to account for personal consumption. Moreover, in discounting the loss of profit sharing plan benefits which would have been received, Dr. Goodman assumed that Mr. Taylor would have actually received each yearly contribution made by Halliburton as a stream of income over his work life expectancy. His estimate of this loss, therefore, represents the amount of money, invested today, which would produce a stream of income equal to the contributions between today and retirement. According to Dr. Boudreaux, however, Mr. Taylor would have received the sum of all the benefits on the date of his retirement, rather than a stream of income from now until retirement. Therefore, Dr. Boudreaux assumed that the entire loss of benefits from the profit sharing plan would have occurred upon retirement, and discounted the loss at 10.25% over Mr. Taylor's entire worklife expectancy. His estimate is of the amount of money that could be invested today at 10.25% to produce the sum of all the contributions due Taylor upon his retirement. I find Dr. Boudreaux's calculation to be more suited to the Halliburton profit sharing plan.

Dr. Boudreaux submitted two alternative figures for computing the discount for profit sharing contributions. The first was 10.25%, the same rate he used to discount the lost wages. The second was a higher rate of 15%. Dr. Boudreaux considered the higher rate more appropriate to account for the more risky investments of the profit sharing plan. Over time, he stated, losses from these risky investments would lower the average rate of earnings for the plan.

Although I find that Dr. Boudreaux's method of computing the loss of benefits from the profit sharing plan finds more support in the record than Dr. Goodman's, I find the discount rate of 15% excessive. Dr. Boudreaux has already calculated the average earnings of the fund to be 9.15% and has included that earnings rate in determining the value of the total benefits before discount-

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[4] This conclusion is limited to the presentation of the evidence in this case. I by no means assert that the statistical evidence could not be overcome by a demonstration in a particular case that the wage earner's personal expenses were smaller, or that certain shared, fixed expenses consumed a large part of the family budget. In this case, plaintiff simply failed to make that demonstration sufficiently by presenting the court with some tangible evidence of Mr. Taylor's personal consumption.

ing. The more risky nature of the investments is already included in the calculation of the average earnings of the plan, since the loss resulting from bad investments reduces the estimate of average earnings over a period of time. Accordingly, I adopt the discount rate of 10.25% and Dr. Boudreaux's estimate of the discounted value of the profit sharing plan of $35,586.57.

The final flaw in Dr. Goodman's testimony was his failure to apply any discount to lost support between the date of death and the date of trial. Anticipating the question presented here, *Culver* teaches that

> [i]n those instances where the substantive law permits a court to award pre-judgment interest, the court *must* discount the *damage figure* back to the date of the event, i.e. the injury or death, and may award pre-judgment interest for the period between the event and judgment (emphasis added).

688 F.2d at 311. *Culver*'s rationale in discounting to the date of death remained unexplained. However, Dr. Boudreaux testified that discounting to the date of death was economically appropriate, since the plaintiff should be awarded as damages her total pecuniary loss as of the date of death, that is, the amount of money which could have been invested at the date of death at the discount rate to produce her pecuniary loss as a result of the death. The award of pre-judgment interest would then compensate her for the loss of the use of that money between the date of death and the date of trial. Since pre-judgment interest may and will be awarded here, *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1958), *cert denied* 361 U.S. 885 (1959), Dr. Boudreaux's calculations are more appropriate.

Although I have applied Dr. Boudreaux's estimate of the lost support to the plaintiff from Mr. Taylor's lost employment benefits, his calculations must be adjusted in two respects. First, he assumed that Mr. Taylor

would have remained a cementer through 1981, earning a salary of $2,115 per month, or $25,380 per year. Since I find that Mr. Taylor would have been promoted to the position of tool operator at the beginning of 1981, at a salary of $33,295 per year, Dr. Boudreaux's estimate must be adjusted upward to reflect the increased support resulting from this higher wage.

Second, Dr. Boudreaux assumed that Mr. Taylor would have been a tool operator in 1982 at a salary of $33,295 [5] and that he would have remained a tool operator for the remainder of his work life expectancy. His calculations of lost wage income after 1982 are founded upon a base wage of $33,295. Since I find that Mr. Taylor would have been promoted to special operator in 1982, the base wage of Dr. Boudreaux's calculations would have to be increased.[6] The increase in the base wage affects not only the determination of lost wages, but also of loss of support attributable to contributions by Halliburton to the profit sharing plan, since those contributions are a percentage of the employee's base wage.

Accordingly, I find Dr. Boudreaux's calculations of loss of support to the plaintiff to be more appropriate. However, they must be adjusted in accordance with and consistent with my findings.

Having considered the evidence presented at trial, memoranda of counsel, the law applicable to the case,

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[5] Dr. Boudreaux's use of $33,295 as the base wage of a tool operator, even assuming that Mr. Taylor would have remained a tool operator for the duration of his career at Halliburton, is erroneous. Mr. Verrett testified that the average wage of tool operators in 1981 was $33,295. Since I find that wages at Halliburton increase at 5.3% annually, the 1982 wage of a tool operator would be 5.3% greater than the wage used by Dr. Boudreaux.

[6] In 1981, special operators at Halliburton earned $38,000. Mr. Verrett testified that special operators would earn about $40,000 in 1982. This testimony was given before 1982 had ended.

and the entire record of this proceeding, I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, Corinne Ann Taylor, was the wife of Michael Taylor at the time he died in a helicopter crash in the Gulf of Mexico on August 6, 1980 and is the proper party plaintiff in this action.

2. Defendant, Air Logistics, a Division of Offshore, Inc. (Air Logistics), owned, maintained and operated the helicopter in which Michael Taylor was a passenger at the time of his death.

3. Defendant, Bell Helicopter, Textron, Inc. (Bell Helicopter) was the manufacturer of the helicopter in which plaintiff's husband was killed.

4. Air Logistics is liable to the plaintiff under DOSHA for the pecuniary loss to her and her daughter resulting from this helicopter casualty.

5. No evidence was presented by plaintiff regarding the liability of defendant Bell Helicopter. Plaintiff has therefore failed to carry its burden of proving by a preponderance of the evidence that Bell Helicopter is liable to plaintiff for the death of her husband.

6. Plaintiff and Michael Taylor were married on September 23, 1967. They were never divorced or separated. One child, Leslie Ann, was born of the marriage. She was 10 years old at the time of her father's death.

7. Michael Taylor was born on January 10, 1948. At the time of his death on August 6, 1980, his work life expectancy was 27.1 years.

8. Mr. Taylor was employed by Halliburton Company (Halliburton) in 1971 and remained continuously in its employ until his death on August 6, 1980.

9. Mr. Taylor began work at Halliburton as a truck driver, and was later promoted to the position of 'cementer,' the position he held at the time of his death. At that time, he earned a monthly salary of $2,115.00, or $25,380 per year.

10. According to the testimony of Robert Verrett, the Assistant District Manager of Halliburton, Mr. Taylor was well regarded by his superiors, and his chances for promotion were very good. Mr. Verrett further testified that Mr. Taylor was a likely candidate for promotion to the position of 'tool operator' at the time of his death. I find, therefore, that he would have been promoted to become a 'tool operator' at the beginning of 1981 had he not been killed in the helicopter crash.

11. The base pay of a 'tool operator' in 1981 was $2,360 per month. Due to the long hours required of 'tool operators,' and the opportunity to earn overtime pay, the average annual earnings of employees at Halliburton in that position during 1981 were $33,295.00.

12. According to Mr. Verrett, the normal progression at Halliburton after at least six months as a 'tool operator' is to a 'special operator.' The quality of Mr. Taylor's work was such that he probably would have been promoted to 'special operator' within one year after his promotion to 'tool operator.' Accordingly, I find that beginning in January of 1982, Mr. Taylor would have been promoted to 'special operator,' which according to the testimony of Mr. Verrett, drew a salary of $38,000 per year in 1981.

13. Mr. Taylor's beginning wage in 1982 as a 'special operator' would have been $40,000 per annum. Mr. Verrett testified that the annual earnings of a 'special operator' in 1982 would approximate $40,000.

14. For the 30 years before 1981, the average yearly increase in rates of pay for Halliburton employees has been

5.3%. Both expert witnesses testified that wages could be expected to increase at this rate in the future. Accordingly, I find that Mr. Taylor's earnings would have increased at an annual rate of 5.3% per year for the remainder of his work life expectancy.

15. No further evidence was presented to show Mr. Taylor's income from his employment at Halliburton would have increased as a result of promotions, merit raises, or the like. I find, therefore, that Mr. Taylor would have retained the position of 'special operator' for the duration of his work life expectancy. Increases in his income would be limited to the 5.3% inflationary increase.

16. Halliburton had a voluntary profit sharing program for the benefit of its employees. The plan vested upon retirement of the employee. The average annual contribution by the company to the plan was 13.376% of the employee's base pay. The profit sharing plan vested the contributed funds and earned 9.15% annually on those funds. Mr. Taylor would have been entitled to receive the accumulated benefits in the plan, i.e. his total contributions plus interest earned upon those contributions, upon retirement at the end of his work life expectancy.

17. In arriving at loss of support, the wage income and profit sharing plan benefits which would have been received by Mr. Taylor must be reduced by the percentage that Mr. Taylor would have consumed personally and therefore would have been unavailable to plaintiff as support. I find that while Leslie Ann was dependent on the family for support until she graduated from college at age 21, Mr. Taylor would have personally consumed 27% of his take home income. After his daughter reached 21, his personal consumption as a percentage of his wage income would have increased to 34%. Since all profit sharing plan benefits would have been received upon retirement, long after Leslie Ann had left home, the personal consumption figure of 34% must be applied to the profit sharing plan benefits in determining loss of support.

18. The loss of support to plaintiff from Mr. Taylor's wage income and the profit sharing plan benefits must be discounted at the rate of 10.25% to its present value as of the date of Mr. Taylor's death.

19. The discounted value of the lost support from wages Mr. Taylor would have earned, accepting Dr. Boudreaux's testimony and assuming that plaintiff would have earned a salary of $33,295 in 1982, is $274,857.73. Based upon the same assumptions, the lost support from the profit sharing plan benefits is $35,586.57. These estimates must be adjusted upward to reflect my findings that Mr. Taylor would have earned $33,295 in 1981, and that his base wage in 1982 would have been $40,000.

20. Although Mrs. Taylor testified that her husband performed some household services during his time off, such as maintaining the financial records, mowing the lawn, and making repairs on the family home and automobile, no evidence of the value of those services was introduced. Accordingly, I am unable to fix a value for the loss to the plaintiff of these services.

21. Mrs. Taylor testified that her husband spent much of his spare time with his daughter. She stated that he often took her golfing or swimming and that he hoped to send her to college. I find that Mr. Taylor contributed to the nurture, guidance, and care of Leslie Ann, and that he would have continued to do so until his daughter left home for college at age 18. No evidence of the value of this element of loss to Leslie Ann was introduced by the plaintiff. Accordingly, considering the nature of the time spent by Mr. Taylor with his daughter and the opportunities that he had to be with her while not at work, I assess the economic value of the 'nurture, care and guidance' provided by Mr. Taylor to his daughter at $150

per month for the remaining 8 years of her minority after her father died, or $14,400.

22. Plaintiff intervenor, Halliburton Services, A Division of Halliburton Company (Halliburton Services), has paid $39,487.24 in survivors benefits and $30.00 in expenses to plaintiff. (Stipulation of parties, November 15, 1982).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this wrongful death action, 28 U.S.C. 1333.

2. This action is properly brought under the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

3. Liability is admitted by defendant, Air Logistics. Accordingly, it is legally responsible for the pecuniary damages permitted under DOSHA.

4. No evidence of the liability of defendant Bell Helicopter Textron, Inc. exists in the record. Accordingly, the plaintiff's claims against Bell Helicopter must be dismissed.

5. DOSHA permits an action for damages by the personal representative of the decedent. Plaintiff, Corinne Ann Taylor, widow of Michael Taylor, is his personal representative. The recovery in a suit under DOSHA "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought." 46 U.S.C. § 762.

6. Pecuniary losses recoverable under DOSHA by the plaintiff are loss of support due to the lost wage income to the family of the decedent, loss of the value of services which decedent contributed to the family, reasonable funeral expenses, and loss of nurture and guidance to

surviving children. *Mascuilli v. U.S.*, 343 F. Supp. 439 (D.C.Pa. 1972), *reversed on other grounds*, 483 F.2d 81 (3rd Cir. 1973). Pecuniary loss is not restricted to net income or net earnings, but refers to the reasonable expectation of pecuniary benefits which would have flowed from the continued life of the deceased. *Noel v. United Aircraft Corp.*, 342 F.2d 232 (4th Cir. 1964).

7. Damages may not be awarded under DOSHA by resort to speculation or conjecture in determining whether the loss was in fact sustained. *Union Oil Co. of California v. Hunt*, 111 F.2d 269, 277-278 (9th Cir. 1940); *First National Bank in Greenwich v. National Airlines, Inc.*, 171 F. Supp. 528, 537 (S.D.N.Y. 1958). There must be evidence of the existence and extent of damages.

8. No evidence of the monetary value of nurture, care and guidance provided by the decedent to his child need be introduced to establish a basis for recovery for that item of pecuniary loss. *Mascuilli v. United States*, 343 F. Supp. 439, 443 (E.D.Pa. 1972). To recover, the plaintiff must show that the decedent was capable of furnishing training and guidance and that decedent had provided training and guidance while he was alive. *Solomon v. Warren*, 540 F.2d 777, 788 (5th Cir. 1976). Relevant considerations in the valuation of nurture and guidance are the education and character of the decedent, and the attention he paid to his child. *Margin v. Calmar Steamship Corp.*, 342 F. Supp. 479, 483 (D.Maryland 1972). The duration of such an award depends upon the opportunity and necessity for training and care of the child, to be determined upon the facts of the case. *Solomon*, 540 F.2d at 789. When the child leaves home for college, the opportunity and necessity for the provision of nurture and care diminishes. *Id.* Plaintiff in this case established that decedent provided nurture, care and guidance to his daughter, but produced no evidence of the value of that loss. Lacking such evidence, I have determined that plaintiff, in her representative capacity for her daughter,

is entitled to receive as damages for lost nurture, care and guidance a total of $14,400.

9. In determining loss of future financial support resulting from the loss of the decedent's income and benefits from employment, the court must consider (1) the work life expectancy of the deceased, (2) his gross earnings at the time of his death, and his earnings history, (3) deductions from his gross earnings for federal and state income taxes, social security taxes, and union dues, (4) additions to his gross income for fringe benefits, where appropriate, (5) potential increases to the deceased's earnings based on inflationary trends, productivity or merit, (6) additional increases to earnings due to promotion to a higher level of responsibility, (7) appropriate deductions for the personal consumption of the deceased, and (8) the appropriate discount to be applied which reflects the rate of return which might be expected from investing in risk-free government securities requiring no investor sophistication. *Culver v. Slater Boat Co.*, 688 F.2d at 302-306.

10. Damages for loss of support from the lost wage income of Mr. Taylor and the lost profit sharing plan benefits are to be determined in accordance with my findings of fact, using a wage of $33,295 in 1981, and a base wage in 1982 of $40,000 for calculations of lost wage income and profit sharing plan benefits in the future.

11. Awards for pecuniary loss under DOSHA must be discounted to their present value. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982); *Cox v. Northwest Airlines, Inc.*, 379 F.2d 893, 896 (7th Cir. 1967). In this case, the appropriate discount rate is 10.25%.

12. Where the substantive law permits an award of prejudgment interest, any award for loss of pecuniary benefits must be discounted back to the date of the loss, in this case, the date of Mr. Taylor's death. *Culver*, 688 F.2d at 311. Pre-judgment interest may be awarded for

the period between the date of death and the date of judgment in claims under the Death on the High Seas Act. *Culver*, 688 F.2d at 311, n.50; *National Airlines v. Stiles*, 268 F.2d 400 (5th Cir. 1958), *cert. denied* 361 U.S. 885 (1959).

13. Any award of damages for loss of support to plaintiff must be reduced by amounts paid by Halliburton Services, plaintiff-intervenor in survivors benefits and expenses, $39,517.24. *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 588 (2nd Cir. 1961).

14. Pre-judgment interest is awarded to plaintiff from the date of death until the date of judgment at the rate of 10.25 percent, the rate at which the awards for pecuniary loss were discounted. A court sitting in admiralty, in awarding pre-judgment interest were justified, is not required to fix the interest rate at the legal rate provided by the statutes of the state in which it sits. *Federal Barge Lines, Inc. v. Republic Marine, Inc.*, 616 F.2d 372, 373 (8th Cir. 1980); *Complaint of M/V Vulcan*, 553 F.2d 489, 491 (5th Cir. 1977); *Sea-Land Services, Inc. v. Eagle Terminal Tankers, Inc.*, 443 F.Supp. 532, 534 (W.D.Wa. 1977). The purpose of awarding prejudgment interest is to insure that the injured party is fully and fairly compensated for its losses and to restore the party to the position it would have been in but for the pecuniary losses. *Federal Barge Lines*, 616 F.2d at 373; *Complaint of M/V Vulcan*, 553 F.2d at 491. In this case, pecuniary losses were calculated as of the date of trial, but were discounted in accordance with the Fifth Circuit's decision in *Culver*, 688 F.2d at 311, to the date of death at the rate of 10.25 percent. The discounted award represents that amount which would have produced the lost stream of income if it had been invested upon the date of Mr. Taylor's death. Since I found that 10.25 percent is the rate at which the funds could have been invested, and discounted accordingly, the award of prejudgment interest at the same rate until the date

of judgment is most appropriate to fairly compensate Mrs. Taylor for the lost use of the money between the date of death and the date of judgment.

14. Plaintiff-intervenor, Halliburton Services, is entitled to receive as damages $39,517.24.

15. Post-judgment interest is awarded in accordance with 28 U.S.C. § 1961.

Let judgment be entered accordingly.

/s/ Morey L. Sear
MOREY L. SEAR
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-3296 & 83-3328

BETH A. TALLENTIRE,
Plaintiff-Appellant,

v.

OFFSHORE LOGISTICS, INC., *et al.*,
Defendants,

AIR LOGISTICS,
Defendant-Appellee.

CORINE ANN SOUDELIER TAYLOR, Individually, as Administratrix of the estate of MICHAEL JOHN TAYLOR, and as natural tutrix of the minor, LESLIE ANN TAYLOR,
Plaintiff-Appellant Cross-Appellee,

v.

BELL HELICOPTER TEXTRON, a DIVISION OF TEXTRON, INC.,
Defendant.

CORINE ANN SOUDELIER TAYLOR, ETC.,
Plaintiff-Appellant Cross-Appellee,

v.

AIR LOGISTICS, INC.,
Defendant-Appellee Cross-Appellant,

v.

HALLIBURTON SERVICES,
Intervenor-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion March 15, 5 Cir., 1985, —— F.2d——)
(May 8, 1985)

Before GARZA, JOLLY and DAVIS, Circuit Judges

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX E

DEATH ON THE HIGH SEAS ACT

46 U.S.C. §§ 761-767 (1982)

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763a. Limitations

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such

right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[s] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

LOUISIANA CIVIL CODE ANNOTATED

Art. 2315. Liability for acts causing damages; survival of action

A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

C. (1) The right to recover damages to property caused by an offense or quasi-offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

(2) As used in this Paragraph, property damages may include expenses or monetary obligations necessarily incurred by the obligee on account of such offense or quasi-offense; however, if the obligee is survived by any beneficiary enumerated in the following Paragraph of this Article, such expenses or obligations shall be recoverable by said beneficiaries.

D. (1) The right to recover all other damages caused by an offense or quasi-offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of:

(a) The surviving spouse and child or children of the deceased, or either such spouse or such child or children;

(b) The surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and

(c) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(2) The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased.

(3) A right to recover damages under the provisions of this Paragraph is a property right which, on the

death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

E. As used in this Article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

APPENDIX F

The following is a complete list of the partially owned subsidiaries and affiliates of petitioner Offshore Logistics, Inc.

Name	Place of Incorporation	Percentage of Stock owned by Offshore Logistics
VIA, Inc.	Louisiana	75%
Hemisco Helicopters International, Inc.	Panama	40%
Aircopter Maintenance International, Inc.	Panama	40%
Heliflight Services, Inc.	Texas	40%
Petroleum Air Services	Egypt	25%
Secunda Marine Services, Ltd.	Canada	50%
Offshore Logistics, (B), Ltd.	Brunei	50%
Guaranty Financial International, N.A.	Netherlands Antilles	40%
S.E.A. Logistics, Ltd.	Hong Kong	50%

OPPOSITION

BRIEF

No. 85-202 (3)

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States
October Term, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PHILIP E. HENDERSON
CHARLES HANEMANN
OF
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081
Attorneys for Respondent
Corine Ann Soudelier Taylor
and
V. FARLEY SONNIER
OF
DAVIDSON, MEAUX, SONNIER
& MCELLIGOTT
810 South Buchanan Street
Lafayette, Louisiana 70502
Telephone: (318) 237-1660
Attorneys for Respondent
Beth A. Tallentire

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QUESTIONS PRESENTED

1. Should this Court grant a writ of certiorari, when the decision below does not conflict with a decision of this Court or of a court of appeals?

2. Should this Court overrule its decision in *The Hamilton,* 207 U.S. 398 (1907), that states' wrongful death acts may apply on the high seas?

3. Should this Court judicially repeal Section 7 of the Death on the High Seas Act, 46 U.S.C.A. §767, which saves application on the high seas of "any State statute giving or regulating rights of action or remedies for death"?

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No. 85-202

In The

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October Term, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

James Tallentire resided with his wife in Louisiana. He was employed by Gator Hawk, Inc. in Louisiana. Michael Taylor resided with his wife and ten-year-old daughter in Louisiana. He was employed by Halliburton Services in Louisiana. Both Mr. Tallentire and Mr. Taylor worked on fixed platforms in the Gulf of Mexico off the coast of Louisiana.

On August 6, 1980, Mr. Tallentire and Mr. Taylor were passengers in a helicopter owned and operated by

Air Logistics, a division of Offshore Logistics, Inc., a Louisiana corporation. The helicopter was based in Louisiana. While transporting them from a fixed platform off the coast of Louisiana to an airport in Louisiana, the helicopter crashed into the Gulf, more than three miles from Louisiana's coast, killing Mr. Tallentire and Mr. Taylor.

Their widows sued in federal courts, asserting claims for pecuniary damages under the Death on the High Seas Act (DOHSA), 46 U.S.C.A. §§ 761 et seq., and for both pecuniary and non-pecuniary damages under Louisiana's wrongful death act, Article 2315 of the Louisiana Civil Code. Both DOHSA and Article 2315 are quoted in full in Appendix E, pages 73a-76a, to the petition for certiorari. The district court struck the claims under state law, denied non-pecuniary damages, and awarded only pecuniary damages under DOHSA.

The widows appealed, pressing for the application of Louisiana's wrongful death act on the high seas. The Fifth Circuit rejected the plaintiffs' argument that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333, adopted Louisiana law as the surrogate federal law applicable to this accident. But the Fifth Circuit agreed that Louisiana's wrongful death act applies outside of Louisiana by its own force, and that Section 7 of DOHSA explicitly permits it to apply on the high seas. The Fifth Circuit vacated the district court's judgment and remanded with instructions to consider the widows' claims under Louisiana law for non-pecuniary damages.

The defendant now petitions this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

1. The decision below conflicts with no other decision of a court of appeals. The decedents in this case were platform workers, not Jones Act seamen. The defendant asserts that the Fifth Circuit's decision below conflicts with the Ninth Circuit's in *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983). *Nygaard* involved the death of a Jones Act seaman, whose survivors' remedies under state law are preempted by the Jones Act. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Lindgren v. United States*, 281 U.S. 38 (1929). The Jones Act does not apply to the instant claims, and therefore does not preempt the plaintiffs' state remedies. To the contrary, Section 7 of DOHSA, 46 U.S.C.A. §767, expressly reserves the plaintiffs' claims under the state wrongful death act.

2. The decision below is not inconsistent with a decision of this Court. No decision of this Court compels the conclusion that DOHSA preempts application of state wrongful death acts on the high seas. To the contrary, this Court's decision in *The Hamilton*, 207 U.S. 398 (1907), recognizes the applicability of state wrongful death acts on the high seas. Section 7 of DOHSA expressly preserves application of state wrongful death acts on the high seas.

3. Given the general principle that state wrongful death acts may apply on the high seas, Louisiana's particular wrongful death act applies on the high seas, either through Section 7 of DOHSA, *La Bourgogne*, 210 U.S. 95 (1907); *The E.B. Ward, Jr.*, 17 Fed. 456 (5th Cir. 1883); *Romero v. State Farm Mut. Auto. Ins. Co.*, 277 So.2d 649 (La. 1973); *Jagers v. Royal Indem. Co.*, 276 So.2d 309 (La. 1973), or through the Outer Continental Shelf Lands Act,

43 U.S.C.A. §1333. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

4. Application of Louisiana's wrongful death act on the high seas fosters uniformity offshore. Louisiana's wrongful death act already affords a remedy to survivors of platform workers killed on platforms. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). Adherence to Section 7 of DOHSA as written assures the same remedies for the survivors of platform workers killed on the high seas surrounding their platforms. But assuming arguendo that Section 7 of DOHSA promoted disuniformity on the high seas, the courts could not for that reason disregard it.

5. The Fifth Circuit's construction of Section 7 of DOHSA comports perfectly with that Section's plain and unambiguous meaning, with congressional intent, and with established principles of statutory construction.

ARGUMENT

The defendant and amici curiae seek certiorari on grounds that: (1) the Fifth Circuit's decision conflicts with the Ninth Circuit's in *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983), and other decisions of circuit courts of appeals; (2) the Fifth Circuit's decision is inconsistent with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), and other decisions of this Court; (3) the Fifth Circuit's decision erroneously allows Louisiana's wrongful death act to apply on the high seas; (4) the

Fifth Circuit's decision fosters disuniformity on the high seas. None of these grounds has merit.

1. The Fifth Circuit's decision does not conflict with other decisions of circuit courts.

The demands on this Court are too great to permit attention to spurious conflicts. Certiorari should be granted only "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

The Fifth Circuit declared in the instant case,

> We recognize that this holding places us in conflict with the Ninth Circuit. In *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983), the Ninth Circuit held that maritime uniformity required the conclusion that DOHSA preempts state statutes.

754 F.2d at 1283. It is upon this purported conflict between the Fifth and Ninth Circuits that the defendant rests its plea for a writ of certiorari. But despite the Fifth Circuit's explicit admission of a conflict, THERE IS NO CONFLICT between the Fifth and Ninth Circuits. The cases are easily harmonized.

Unlike the decedents here, the decedent in *Nygaard* was a Jones Act seaman. The decedents here were platform workers, not seamen.

A litigant entitled to recover under the Jones Act, 46 U.S.C.A. § 688, has no cause of action under state law. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Lindgren v. United States*, 281 U.S. 38 (1929). Section 7 of DOHSA saves only causes of action under a "state stat-

ute giving or regulating rights of action or remedies for death." 46 U.S.C.A. §767. Survivors of a deceased Jones Act seamen have no "rights of action or remedies for death" under a state statute, so they have nothing for Section 7 of DOHSA to save. Inexplicably, *Lindgren* and *Gillespie* were not cited to or by the *Nygaard* court, but would certainly have controlled, and would have compelled the same result that the Ninth Circuit reached. Thus, whether or not Section 7 of DOHSA operates to save the rights of Mrs. Tallentire and Mrs. Taylor under Article 2315 of the Louisiana Civil Code, the *Nygaard* court correctly refused to accord state rights to the survivor of a Jones Act seaman. Section 7 of DOHSA was not properly at issue in *Nygaard*. The *Nygaard* court's failure to cite or mention Section 7 of DOHSA tacitly but clearly recognized that the Jones Act preempted state rights, leaving nothing for Section 7 to save in Jones Act cases.

But the survivors of Tallentire and Taylor, who were not Jones Act seamen, do have rights under the wrongful death act of Louisiana, notwithstanding that they died on the high seas. *The Hamilton,* 207 U.S. 398 (1907); *The E.B. Ward, Jr.,* 17 Fed. 456 (5th Cir. 1883). See also *Skiriotes v. Florida,* 313 U.S. 69 (1941). And Section 7 of DOHSA saves those rights, just as the Fifth Circuit decided.

The amici curiae argue that the Fifth Circuit's decision conflicts also with two decisions of other circuit courts of appeals, *Petition of United States,* 418 F.2d 264 (1st Cir. 1969); and *Middleton v. Luckenbach S.S. Co.,* 70 F.2d 326 (2d Cir.), *cert. denied* 293 U.S. 577 (1934), and with two of the Fifth Circuit's own decisions, *Vaz Borralho v.*

Keydril Co., 696 F.2d 379 (5th Cir. 1983); and *Lockwood v. Astronautics Flying Clubs, Inc.,* 437 F.2d 437 (5th Cir. 1971). The amici curiae are mistaken. No such conflicts exist. The plaintiffs in *Petition of United States* and *Vaz Borralho* were survivors of seamen, whose remedies under the Jones Act foreclosed any claim under state wrongful death acts, *Lindgren v. United States, supra; Gillespie v. United States, supra,* leaving no state remedy for Section 7 of DOHSA to save. In *Petition of United States, Middleton* and *Lockwood,* no plaintiff claimed a right under state law, so Section 7 of DOHSA was not at issue.

Thus, there is no conflict among the Fifth Circuit's decision in this case and other decisions of circuit courts of appeals.

2. The Fifth Circuit's decision is inconsistent with no decision of this Court.

The defendant and amici curiae accuse the Fifth Circuit of inconsistency, if not direct conflict, with decisions of this Court: *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1875); *Southern Pac. Co. v. Jensen,* 244 U.S. 205 (1917); *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920); *Moragne v. States Marine Lines,* 398 U.S. 375 (1970); and *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978). No such inconsistency exists.

At issue in *The Lottawanna* was only a claim of a lien against a vessel under state law for materials supplied on the state's territorial waters, not a claim under state law for wrongful death on the high seas. The lien was disallowed, but this Court was cautious to point out that but for the claimant's failure to perfect his lien in accordance with the state statute, and the existence of an Ad-

miralty Rule directly on point, the lien under the state statute would have been valid.

In *Southern Pac. Co. v. Jensen,* this Court held that a state workmen's compensation statute could not constitutionally apply to a longshoreman's death on territorial waters of a state. The Court reasoned that Article I, Section 8 of the United States Constitution, conferring upon Congress the power "to make all Laws", left no room for state compensation statutes. But the Court said,

> [I]n the absence of some controlling statute, the general maritime law . . . constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction. . . .

244 U.S. at 215. The first clause of the quoted passage clearly implies that Congress can, by "some controlling statute", permit operation of state statutes in the admiralty and maritime field concurrently with federal law, which is precisely what Section 7 of DOHSA does. The Court acknowledged that even absent a statute of Congress, state statutes can operate in the admiralty and maritime field, citing *The Hamilton, supra,* as an example. 244 U.S. at 216.

On the heels of *Jensen,* Congress amended the Judiciary Act of 1789, 1 Stat. 73, to save jurisdiction in state courts not only over common law remedies, but also over remedies under state compensation statutes. In *Knickerbocker Ice Co. v. Stewart,* the Court invalidated that amendment as an unconstitutional attempt to abrogate the admiralty and maritime jurisdiction of the federal courts. Section 7 of DOHSA was not even in force then, much less at issue in *Knickerbocker.* The Court, far from overruling *The Hamilton,* cited it as viable authority, but

understandably declined to extend it to a claim for benefits under a state compensation statute arising out of an accident on territorial waters of a state. 253 U.S. at 166.

The death in *Moragne v. States Marine Lines* occurred on territorial waters of Florida. The plaintiff alleged the unseaworthiness of the vessel, but Florida's wrongful death act did not recognize unseaworthiness as a ground for recovery. So the question before this Court was *not* whether Florida's wrongful death act applied on Florida's territorial waters, but whether the general maritime law allowed recovery for wrongful death on territorial waters of a state. This Court answered affirmatively, overruling *The Harrisburg,* 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886). The construction of DOHSA and the application of state law on the high seas were not at issue.

What relevant *dicta* can be found in *Moragne* support the Fifth Circuit's application of Louisiana's wrongful death act on the high seas through the instrumentality of Section 7 of DOHSA. This Court condemned as "erroneous" the construction of Section 7 of DOHSA espoused during the House debate, 59 Cong.Rec. 4482 et seq. (daily ed. Mar. 17, 1920), by the minority in the House, which same reprobated view the defendant now presses upon the Court. 398 U.S. at 400 n. 14. *Moragne* teaches that, "[T]he message of [DOHSA] is that it does not by its own force abrogate available state remedies . . . . " *Ibid.*

The issue in *Mobil Oil Corp. v Higginbotham,* and the only issue, was whether DOHSA superseded the general maritime law wrongful death action under *Moragne v. States Marine Lines* in waters overlying the Outer Continental Shelf seaward of the boundary of the adjacent state. As between DOHSA and the general maritime law

only, *Higginbotham* made it clear that DOHSA prevails, to the exclusion of the general maritime law. But there *Higginbotham* stopped. No party in *Higginbotham* contended that the law of the adjacent state applied. Nor did this Court consider whether DOHSA preempted a state wrongful death statute on the high seas.

Thus, the Fifth Circuit's decision is inconsistent with no decision of this Court.

3. Louisiana's wrongful death act does apply on the high seas.

Article 2315 of the Louisiana Civil Code, quoted in full in Appendix E to the petition for certiorari, pp. 74a-76a, is Louisiana's wrongful death act.

This Court long ago settled that the wrongful death acts of states may apply on the high seas. *The Hamilton, supra.* To the same effect is the Fifth Circuit's venerable decision in *The E.B. Ward, Jr., supra,* applying Article 2315 itself on the high seas.

DOHSA did not exist in 1907 when this Court decided *The Hamilton.* This Court therefore decided *The Hamilton* against a backdrop of congressional inaction. In 1920, Congress acted, adopting DOHSA. But Congress's action did not change the rule of *The Hamilton.* To the contrary, Section 7 provided:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

46 U.S.C.A. § 767.

Given the general principle that state wrongful death acts may apply on the high seas, the question becomes whether Article 2315 in particular applies on the high seas. The Supreme Court of Louisiana has ruled that the tort law of Louisiana does apply outside Louisiana's boundaries. *Romero v. State Farm Mut. Auto Ins. Co.,* 277 So.2d 649 (La. 1973); *Jagers v. Royal Indem. Co.,* 276 So.2d 309 (La. 1973). The Fifth Circuit has applied Louisiana's wrongful death act on the high seas. *The E.B. Ward, Jr., supra.* This Court has applied Article 1382 of the French Code Napoleon, the almost verbatim counterpart of Article 2315 of the Louisiana Civil Code, on the high seas. *La Bourgogne,* 210 U.S. 95 (1907). This Court has applied on the high seas the wrongful death act of Delaware, a statute no more expansively worded than Louisiana's Article 2315. *The Hamilton, supra.* Thus, Louisiana's wrongful death act does apply on the high seas.

The defendant argues incorrectly at page thirteen of its petition that in *Moragne* and *Higginbotham* this Court evidenced an intent to foreclose all borrowing from state law. In fact, all the Court did in *Moragne* was to create a wrongful death action under the general maritime law. The Court said nothing about foreclosing application of Florida law on navigable waters. Borrowing Florida law was not at issue in *Moragne,* because the claimed basis of recovery, unseaworthiness, was not a basis of recovery under Florida law. Nor was borrowing state law at issue in *Higginbotham,* where the only question was whether DOHSA foreclosed application on the high seas of the death action created in *Moragne.* Borrowing state law was in no way involved in either case, and the Court did not speak out in either case against borrowing state law.

Certainly, borrowing from state law is not prohibited. Congress has borrowed state law as the surrogate federal law on fixed platforms on the Outer Continental Shelf, 43 U.S.C.A. § 1333, in national parks, and on other federally owned lands. 16 U.S.C.A. § 457. But regardless, if state law is borrowed, or applied in any way, in the instant case, it is by reason of Congress's express language in Section 7 of DOHSA, which the courts may not ignore.

In the lower courts, the plaintiffs urged that, pretermitting Section 7 of DOHSA, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333, requires application of Louisiana's wrongful death act to the instant case as surrogate federal law. The Fifth Circuit erroneously rejected this argument below, but did apply Louisiana's wrongful death act by reason of Section 7 of DOHSA. But OCSLA, correctly construed, produces the same result. The pertinent section of OCSLA provides:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal Laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf . . . .

43 U.S.C.A. § 1333(a)(2)(A).

A misconception in some quarters is that OCSLA applies only within the physical confines of a platform. This misconception must be dispelled.

The landmark case of *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969), involved two fatalities. One victim, Dore, was operating a crane mounted on a fixed platform. The crane fell from the platform onto a barge below, afloat on navigable waters of the Gulf of Mexico. Dore was injured and killed when he and the crane struck the barge. The Fifth Circuit applied DOHSA rather than state law under OCSLA. *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968). This Court reversed, applying state law through OCSLA to the death of a platform worker, even though the death had occurred on a barge, a traditionally maritime locale, beyond the physical confines of the platform. Subsequently, the Fifth Circuit has applied the substantive law of states as surrogate federal law on the Outer Continental Shelf in cases involving deaths of or injuries to platform workers occurring not on platforms but on navigable waters. In re *Dearborn Marine Serv.*, 499 F.2d 263 (5th Cir. 1974); *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir.), *cert. denied*, 409 U.S. 984 (1972); *Bertrand v. Forest Corp.*, 441 F.2d 809 (5th Cir.), *cert. denied*, 404 U.S. 863 (1971). These cases honor the congressional intent that state law not be confined to the platforms.

In this context, this Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), is most enlightening. There, a platform worker had been transferred from a fixed platform on the Outer Continental Shelf to a crew boat on the Gulf. After the plaintiff had been aboard the boat for some time, a wave washed him across the deck, injuring him. This Court granted certiorari to consider two issues:

(1) Whether state courts have concurrent jurisdiction with federal courts to decide cases arising under OCSLA; and

(2) Whether in a case arising under OCSLA the jury should be instructed that awards are not taxable under the law of Texas.

Whether or not OCSLA applied to the plaintiff's injury aboard the vessel was not directly before this Court. However, this Court mentioned that the lower court had "acknowledged that OCSLA governed the case," and at least implicitly agreed that OCSLA governed the injuries aboard ship to the platform worker. Otherwise, this Court would never have undertaken to grapple with either of the two issues directly presented. Neither question would have been presented unless 43 U.S.C.A. § 1333(a) (2) (A) extended the substantive law of the adjacent state to the platform worker's accident aboard the crew boat. An inescapable inference from this Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.*, therefore, is that OCSLA extends the substantive law of the adjacent state to accidents involving platform workers on navigable waters.

The instant case is closely analogous to *Gulf Offshore Co. v. Mobil Oil Corp.* The victims in both cases were platform workers, being transported from the platform to the adjacent state, Tallentire and Taylor by helicopter, the victim in *Gulf Offshore* by crew boat. The helicopter in the instant case was performing the same function as the crew boat in *Gulf Offshore Co. v. Mobil Oil Corp.* See *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980). As this Court did in *Gulf Offshore Co. v. Mobil*

Oil Corp., the Fifth Circuit should have applied the substantive law of the adjacent state, Louisiana, as the surrogate federal law adopted by the OCSLA. This would be additional and discrete grounds for awarding the plaintiffs non-pecuniary damages under Louisiana law.

Admittedly, the victim in *Gulf Offshore Co. v. Mobil Oil Corp.* did not die, but the admiralty law would still have provided him a remedy had he chosen to invoke it. Notwithstanding that fact, this Court treated his claims as within the provisions of OCSLA extending state law seaward as the surrogate federal law, and thus overlapping with the general maritime law. There is no indication in this Court's opinion, nor is there any reason to believe, that a different result would have been obtained had the victim in *Gulf Offshore Co. v. Mobil Oil Corp.* died.

Below, the Fifth Circuit declined to apply Louisiana's wrongful death act on grounds that it was inconsistent with federal law, as expressed by DOHSA. But this court disposed of that contention in *Gulf Offshore Co. v. Mobil Oil Corp.*, recognizing that state tort law can be applied alongside general maritime law on the high seas. It necessarily follows that Louisiana's wrongful death act is "not inconsistent with" federal law.

Thus, Louisiana's wrongful death act applies on the high seas as well through OCSLA as through Section 7 of DOHSA.

4. The Fifth Circuit's decision fosters uniformity offshore.

The defendant attacks the Fifth Circuit's adherence to the plain meaning of Section 7 of DOHSA as disruptive of the uniformity desired in maritime law. This Court

long ago settled that application of state wrongful death acts on the high seas produces no "lamentable lack of uniformity." *The Hamilton,* 207 U.S. at 406. More recently, the Court has said, "[U]niformity is not offended by 'the right given to recover in death cases'." *The Tungus v. Skovgaard,* 358 U.S. 588, 594 (1959).

Contrary to the defendant's contention, the Fifth Circuit's opinion promotes uniformity on the high seas. OCSLA already extends state tort laws to the innumerable fixed platforms on the Outer Continental Shelf, as surrogate federal law. *Rodrigue v. Aetna Cas. & Sur. Co., supra.* For state law to afford a remedy for deaths of platform workers on platforms themselves, but not to deaths of platform workers on the high seas surrounding the platforms, would be anomalous, illogical, and unfair. The Fifth Circuit has properly interpreted Section 7 of DOHSA so that state law, concurrently with DOHSA, provides the measure of recovery for deaths of platform workers on the high seas surrounding the fixed platforms. Now, under the Fifth Circuit's decision, survivors of platform workers may recover both pecuniary and non-pecuniary damages under state law, whether the death occurs on a platform or on the high seas surrounding the platform.

But even if the Fifth Circuit's adherence to Section 7 of DOHSA as written promoted disuniformity, the courts could not disregard Section 7. "[A] desire for uniformity cannot override the statute." *Mobil Oil Corp. v. Higginbotham,* 463 U.S. at 624. Section 7 plainly saves state remedies on the high seas.

The defendant complains that the application of state wrongful death acts on the high seas would produce con-

fusion, because their provisions are not always identical with the general maritime law. This problem is illusory. Traditionally, admiralty courts have enforced rights created under state statutes.

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. . . .
>
> State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. . . .
>
> [A]ll these laws and others have been accepted as rules of decision . . . in admiralty cases, even, at times, when they conflicted with the rule of maritime law which did not require uniformity. "In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National Government has left much regulatory power in the States." Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Romero v. International Terminal Operating Co., 358 U.S. 354, 373-374 (1959).

> [W]hen admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. . . .

The Tungus v. Skovgaard, 358 U.S. at 592. In interpreting the applicable state wrongful death action, the courts will need only do so as would a court of that state.

The amici curiae bemoan that substantive provisions of state wrongful death acts differ confusingly from state to state. It is only obvious that substantive provisions of wrongful death acts differ from state to state. Those differences were no less obvious to Congress when it passed Section 7 of DOHSA in 1920 than they are today. In passing Section 7, Congress obviously intended that the substantive differences among state death acts would persist, on the high seas as well as on land.

Substantive differences among the wrongful death acts of states create no genuine difficulty. The choice of the appropriate state wrongful death act will be, at worst, an accustomed exercise in conflicts of laws, the likes of which are quite familiar to the courts.

> Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit.

The Hamilton, 207 U.S. at 406.

In the instant case, there is not even a true conflict of laws. All of the relevant contacts are with Louisiana. Both of the decedents, their widows, and Taylor's daughter resided in Louisiana. Both Tallentire and Taylor worked for employers in Louisiana. Both regularly flew from airports in Louisiana to work on fixed platforms off Louisiana, and returned to airports in Louisiana. The heliocopter which crashed belonged to Air Logistics, a company domiciled and headquartered in Louisiana, was based on land in Louisiana, and was heading for Louisiana from a fixed platform off Louisiana at the time of the crash. Since all relevant contacts were with Louisiana, this was a "false conflict", *Jagers v. Royal Indem. Co., supra* at 311.

As in *Jagers v. Royal Indem. Co.* and *Romero v. State Farm Mut. Auto. Ins. Co.,* both *supra,* the courts of Louisiana would have surely applied Article 2315, Louisiana's wrongful death statute, notwithstanding that the crash occurred outside Louisiana's seaward boundary.

In any event, there is a higher principle at work here than uniformity: separation of powers. No one has questioned that Congress had the constitutional authority to pass DOHSA, including Section 7. For this Court to read out Section 7 of DOHSA on grounds that it compromises maritime uniformity, would encroach impermissibly upon the legislative prerogative. Courts cannot ignore plain and unambiguous language of a constitutionally enacted statute, even though the courts may believe the statute unwise.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . . .
>
> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-195 (1978). Whether Section 7 of DOHSA contributes to uniformity or to disuniformity, this Court is bound to follow it as written.

5. The Fifth Circuit correctly and fairly construed Section 7 of DOHSA to apply Louisiana's wrongful death act on the high seas.

The defendant's fundamental position, plain and simple, is that the Court should read Section 7 out of DOHSA. The Court cannot do so.

> It is [the Court's] duty "to give effect, if possible, to every clause and word of a statute," . . . rather than to emasculate an entire section. . . .

United States v. Menasche, 348 U.S. 528, 538-539 (1955).

> [A] statute should be interpreted so as not to render one part inoperative. . . .

Colautti v. Franklin, 439 U.S. 379, 392 (1979).

If Section 7 of DOHSA does not allow application of Louisiana's wrongful death act to this case, it has no meaning at all. If Section 7 means anything, it means that the wrongful death acts of states may apply on the high seas.

The defendant argues fallaciously, at page five of its brief, that to give Section 7 its plain meaning, as did the Fifth Circuit, will "destroy the integrity of DOHSA." To interpret a statute as written does not destroy its integrity. What does destroy a statute's integrity is to ignore its plain and unambiguous language, as the defendant advocates.

The defendant and amici curiae seek support in the House debates on DOHSA. The meaning of Section 7 is clear. Recourse to House debates is unnecessary and inappropriate.

> [T]he debates in Congress expressive of the views and motives of individual members are not a

> safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body. . . .

Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921).

> In detemining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."

United States v. Turkette, 452 U.S. 576, 580 (1981).

But, if anything, the House debates support the Fifth Circuit's reading of Section 7 of DOHSA.

Before 1920, the general maritime law of the United States allowed no recovery for wrongful death. *The Harrisburg, supra.* Like many states, Louisiana allowed by statute recovery for wrongful death. La.Civ.Code, art. 2315 (1870). Even before this Court decided *The Harrisburg, supra,* the Fifth Circuit had decided *The E.B. Ward, Jr., supra,* allowing recovery under Article 2315 of the Louisiana Civil Code for a wrongful death on the high seas. In *The Hamilton,* this Court applied Delaware's wrongful death act on the high seas.

In 1920, Congress adopted DOHSA. Congress intended DOHSA to give a new remedy in admiralty for wrongful death, not to take away existing remedies under state laws for wrongful death on the high seas. Nothing in DOHSA itself provides, or even implies, that the existing remedies under state law for wrongful death on the high seas were to be abrogated. The remarks of the representatives who debated the relevant amendment to Sec-

tion 7 of DOHSA, supporters and opponents alike, reflect the intent to give, rather than to take away. *E.g.:*

> The object of this bill is to GIVE a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas.

59 Cong. Rec. 4482 (daily ed. Mar. 17, 1920) (emphasis added).

DOHSA allowed for recovery of pecuniary damages only, a minimum measure of recovery. When DOHSA was passed in 1920, it was against the backdrop of *The Harrisburg, supra.* By giving only pecuniary loss in DOHSA, Congress was giving more than had previously existed at maritime law. Nothing in DOHSA or in the congressional debates evidences an intent to limit recovery under state laws to pecuniary loss only. The reverse is true. Originally, Section 7 of the Bill read:

> [T]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act AS TO CAUSES OF ACTION ACCRUING WITHIN THE TERRITORIAL LIMITS OF ANY STATE.

Ibid. (emphasis added). Most of the discussion in the House addressed the effect of the emphasized language. The representatives generally recognized that state wrongful death actions could be and had been applied on the high seas. Some felt that DOHSA should be exclusive; others felt that state wrongful death acts should remain in effect on the high seas.

To resolve all doubt, Representative Mann offered an amendment striking the phrase, "as to causes of action accruing within the territorial limits of any State." *Id.* at 4484. Representative Mann's purpose in offering the

amendment was manifest. He knew that state wrongful death statutes could and did apply on the high seas. He wanted to be sure that they still did after passage of DOHSA. In Representative Mann's words:

> I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court . . . If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, WHETHER THE CAUSE OF ACTION ACCRUED WITHIN THE TERRITORIAL LIMITS OF THE STATE OR NOT.

Id. at 4484 (remarks of Representative Mann) (emphasis added). Representative Mann's purpose was a humanitarian one. He wanted to see the state wrongful death statutes continue in their application to deaths on the high seas. Representative Volstead, by contrast, did not. In opposition to Representative Mann's amendment, Representative Volstead argued:

> It would be a good deal simpler if we should leave the statute in the form in which it is drawn.

Id. at 4485. To which Representative Mann responded:

> It would be a good deal wickeder.

Ibid.

As ultimately adopted, Section 7 reads as Representative Mann's amendment changed it to read:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. . . .

46 U.S.C.A. §767. The original limitation to "causes of action accruing within the territorial limits of any State" was eliminated. The only implication is that Section 7

allows a state's wrongful death act to operate on the high seas, even beyond the state's territorial limits.

The defendant, at page eight of its petition, and the amici curiae, at page seven of their brief, cite or quote at length from the remarks of Representative Volstead, chief opponent of Representative Mann's amendment, and of Representatives Montague, Igoe, Goodykoontz and Cullen. These representatives all voted AGAINST Representative Mann's amendment. Their views illustrate only what Congress's intent was NOT. Indeed, in *Moragne,* this Court cited Representative Volstead's remarks about the exclusivity of DOHSA, the same remarks as those upon which the defendant and amici rely, and branded them "erroneous". 398 U.S. at 400 n. 14.

In essence, the defendant wants this Court to repeal Section 7 of DOHSA judicially. But

> Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.

Badaracco v. Commissioner, 104 S.Ct. 756, 764 (U.S 1984). This Court has recognized that,

> Perhaps the wisdom we possess today would enable us to do a better job of repudiating *The Harrisburg* than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute. . . .

Mobil Oil Corp. v. Higginbotham, 436 U.S. at 626-627.

This Court, therefore, should decline the defendant's invitation to repeal Section 7 of DOHSA judicially.

———o———

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

PHILIP E. HENDERSON
CHARLES HANEMANN
of
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081

Attorneys for respondent
***Corine Ann** Soudelier Taylor*

and

V. FARLEY SONNIER
of
DAVIDSON, MEAUX, SONNIER & McELLIGOTT
810 South Buchanan Street
Lafayette, Louisiana 70502
Telephone: (318) 237-1660

Attorneys for respondent
Beth A. Tallentire

REPLY

BRIEF

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No. 85-202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS, A Division of Offshore Logistics, Inc.,
Petitioner,
v.
CORRINE ANN SOUDELIER TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

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OCTOBER TERM, 1985

No. 85-202

OFFSHORE LOGISTICS, INC.,
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v.

BETH A. TALLENTIRE,
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AIR LOGISTICS, A Division of Offshore Logistics, Inc.,
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v.

CORRINE ANN SOUDELIER TAYLOR,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

In our petition, we showed that although federal courts sitting in admiralty borrowed from state law in order to provide a remedy for deaths on the high seas prior to the enactment of DOHSA in 1920, such borrowing now is both unnecessary and inappropriate and in fact is foreclosed by *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). We further showed that state wrongful death remedies cannot extend to the high seas by sheer force of state tort law, because federal law is preemptive under the three-part test of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

The respondents do not directly meet these arguments, and they do not even refer to the *Jensen* test.[1] All that really needs to be said about the respondents' discussion of the central issues in this case is that they have misrepresented this Court's decisions in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

About *Moragne*, the respondents make two observations, both wrong or misleading. *First*, they assert that this Court condemned as "erroneous" the "same reprobated view the defendant now presses . . . ." Br. in Opp. 9; *see also id.* at 24. But the view labelled "erroneous" in *Moragne* was the belief that state courts may not assert jurisdiction over cases arising under federal maritime law, *see* 398 U.S. at 400 n.14—a matter that has nothing to do with this case. *Second*, the respondents assert, "*Moragne* teaches that, '[T]he message of [DOHSA] is that it does not by its own force abrogate available state remedies . . . .'" Br. in Opp. 9 (brackets in original). But the Court in *Moragne* was speaking, quite explicitly, about remedies for "deaths in territorial waters." 398 U.S. at 399. The Court obviously believed that, on the high seas, DOHSA is exclusive. Quoting from the legislative history, the Court explained that DOHSA governs "deaths on the high seas, leaving unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States. . . . *This is for the purpose of uniformity, as the States can not properly legislate for the high seas.*" *Id.* at 397 (emphasis supplied).[2]

---

[1] Indeed, the respondents appear to believe, quite wrongly, that the Constitution places no restraint upon the extension of state law into maritime affairs. Br. in Opp. 19. This Court has held otherwise. *See, e.g., Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

[2] The respondents wrongly contend that if state wrongful death statutes do not apply on the high seas, "Section 7 of DOHSA . . . has no meaning at all." Br. in Opp. 20. As this Court recognized in *Moragne*, the meaning of section 7 is that DOHSA does not apply in territorial waters and does not, by its own force, preclude the application of state wrongful death statutes in territorial waters. (Whether state wrongful death statutes actually do apply in territorial waters is now a matter of considerable doubt, in view of this Court's decisions in *Moragne* and *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976).)

The respondents misleadingly discuss *Romero*, and also *The Tungus v. Skovgaard*, 358 U.S. 588 (1959), as if those decisions acquiesce in the disuniformity that would result from applying state wrongful death statutes on the high seas. Both decisions concerned territorial waters, not the high seas. In *Romero*, moreover, the Court pointed out that "Congress was careful to make [DOHSA] applicable only outside state territorial waters so as not to intrude on state legislative competence," 358 U.S. at 374-75 n.42, thereby implying recognition that state wrongful death statutes do not extend to the high seas. The Court further noted that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at 373—precisely the rule of high-seas maritime uniformity flouted by the decision below.[3]

Beyond this, the respondents make two points that deserve reply—not because the points are meritorious, which they are not, but because they may mislead. The respondents argue, incorrectly, that there is no conflict and that the judgment below can be sustained upon an alternative ground rejected by the court of appeals.

---

[3] The respondents' contention that the decision below "promotes uniformity on the high seas," Br. in Opp. 16, is just plain silly. To be sure, under that decision deaths of platform workers will be governed by state law, whether they occur at a platform or on the sea. But that trifling "uniformity" is achieved at the expense of destroying true maritime uniformity virtually across the board.

1. *There is a direct conflict among the circuits.* The Fifth Circuit acknowledged that its decision in this case squarely conflicts with the Ninth Circuit's decision in *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983). *See* Pet. App. 17a. The Fifth Circuit held that "a state statute which is effective to grant rights resulting from deaths on the high seas is not preempted by DOHSA," *id.* at 13a, whereas the Ninth Circuit in *Nygaard* held that "the Death on the High Seas Act preempts state wrongful death statutes," 701 F.2d at 80. The respondents argue that this conflict is "spurious," Br. in Opp. 5, but it is not.

The respondents incorrectly contend that because the plaintiffs in *Nygaard* were survivors of a seaman, their exclusive remedy was under the Jones Act, 46 U.S.C. § 688, and therefore that the Ninth Circuit erred in even considering their claims under DOHSA and DOHSA's scope in relation to state law. The plaintiffs in *Nygaard* were properly pursuing separate claims under the Jones Act and DOHSA. Just last Term, this Court explained that "[a]ny worker, inside or outside the 3-mile limit, who qualified as a seaman . . . could sue under the Jones Act, . . . the Death on the High Seas Act, . . . and the general maritime law." *Herb's Welding, Inc. v. Gray*, 105 S. Ct. 1421, 1425 (1985). *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. at 396 n.12; *Kernan v. American Dredging Co.*, 355 U.S. 426, 430 n.4 (1958). Having disposed of the plaintiffs' Jones Act claims, the Ninth Circuit in *Nygaard* turned to their claims under DOHSA. In that connection, the threshold question presented to and decided by the Ninth Circuit was whether DOHSA precludes recourse to state law—precisely the same question presented to and decided by the Fifth Circuit in this case.

The respondents contend that the result in *Nygaard* was dictated by this Court's decisions in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 154 (1964), and

Lindgren v. United States, 281 U.S. 38 (1930). Br. in Opp. 5-6. In those cases, the Court held that the Jones Act remedy for negligent injury supersedes the application of state wrongful death statutes in territorial waters. The respondents argue that those decisions necessarily imply that in the case of a seaman the DOHSA remedy for wrongful death on the high seas (whether or not caused by negligence) also supersedes state law. In making that contention, the respondents come dangerously near to conceding that *Gillespie* and *Lindgren* by implication control this case as well, for the scope of DOHSA in no way depends upon whether the decedent was a seaman. In any event, although the decisions in *Gillespie* and *Lindgren* appear to foreshadow the result in *Nygaard*, and to point in a direction opposite to the decision below, they did not decide the question presented here and certainly did not foreclose the Ninth Circuit from reaching and deciding that question.

In short, there is a true conflict among the circuits. This Court should grant review to resolve that conflict and to restore maritime uniformity to the high seas.

2. *OCSLA does not apply to the accident in this case.* Because the decedents worked on a drilling platform located in the Gulf of Mexico and the accident which caused their deaths occurred while they were being transported from the platform to shore, the respondents contend that the case is governed not by DOHSA but by the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333. Br. in Opp. 12-15.[4] In essence, the respondents' argument is that platform workers are covered by OCSLA not only at the work site but also when in transit

[4] As the respondents acknowledge, this contention was rejected by the Fifth Circuit. Br. in Opp. 12; Pet. App. 6a-8a. Moreover, because the remedial provisions of DOHSA and OCSLA are mutually exclusive, *see* 43 U.S.C. § 1333, the respondents' contention also is inconsistent with their principal argument, *i.e.*, that DOHSA applies here and acts to preserve state law.

between the work site and land. That argument is wrong.

The two decisions of this Court upon which the respondents rely, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), in fact involved accidents at the work site. In *Rodrigue*, a worker on a crane mounted on a drilling platform died when the crane toppled over. *See* 395 U.S. at 353. In *Gulf Offshore*, a platform worker was injured while assisting in the evacuation of other workers from the drilling platform. *See* 453 U.S. at 475-76. Thus, neither case supports the proposition that platform workers are covered by OCSLA while in transit to or from the platform. Moreover, last Term in *Herb's Welding* this Court strongly suggested that a platform worker is not covered by OCSLA "while in transit." 105 S. Ct. at 1429 n.13.

In the Fifth Circuit, the law is clear. "[T]he simple fact that . . . death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA." *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982). *See also Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 271 n.20 (1972); *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980). In this case, the respondents' suit against the owner and operator of the aircraft of necessity would rest upon DOHSA, not OCSLA, even if the fatal accident had been caused by an event occurring at the platform. *In re Dearborn Marine Service, Inc.*, 499 F.2d 263, 275-76 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975). Where, as here, the accident was remote from the platform, OCSLA plainly has no application.

There is no need for this Court to consider the respondents' OCSLA claims. The decision of the Fifth Circuit rejecting those claims was correct and presents no conflict

with the decisions of this Court or of any other court of appeals. Review in this case may properly be restricted to the questions presented in the petition. *See United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975).

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

AMICUS CURIAE

BRIEF

MOTION FILED
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OFFSHORE LOGISTICS, INC.,
Petitioner
v.
BETH A. TALLENTIRE,
Respondent

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner
v.
CORRINE ANN SOUDELIER TAYLOR,
Respondent

MOTION TO FILE AMICI CURIAE BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

E. D. VICKERY*
GUS A. SCHILL, JR.
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

**Counsel of Record*

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-202

OFFSHORE LOGISTICS, INC.,
Petitioner

v.

BETH A. TALLENTIRE,
Respondent

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner

v.

CORRINE ANN SOUDELIER TAYLOR,
Respondent

MOTION TO FILE AMICI CURIAE BRIEF AND ACCOMPANYING BRIEF

MOTION

COME NOW your Applicants, Sonat Offshore Drilling, Inc., Global Marine, Inc., Western Oceanic, Inc., Sub Sea International, Inc., Ocean Drilling & Exploration Company, Oceaneering International, Inc., Gulf Oil Corporation, and Chevron Corporation, and move this Court

for permission to file their amici curiae brief in support of the Petition for Writ of Certiorari filed by Offshore Logistics, Inc. and Air Logistics. Petitioners have given their consent (Exhibit "A") to the filing of the brief, but Respondents have withheld authorization. Therefore, leave must be sought to file the amici curiae brief since only several of the parties as opposed to all parties have consented to the filing. Your Applicants transmitted by express mail on August 21, 1985 to Respondents' attorneys copies of the manuscript of both the Motion and Brief so that counsel could formulate within the framework of this Court's rules any replies which they desire to make.

Your Applicants are cognizant of the Court's Rule 36 that a motion to file an amicus curiae brief in support of the issuance of a Writ of Certiorari is not favored when there is a lack of consenting unanimity by the litigants; however, your Applicants are so adversely affected by the erroneous attempt on the part of the opinion below to subordinate explicit rules set forth by the Death on the High Seas Act (hereinafter referred to as DOHSA)[1] to a state's wrongful death action that permission is sought to file the attached amici curiae brief in order to demonstrate that a Writ of Certiorari should issue from this Court.

Your Applicants are drilling companies or offshore lease owners which have operations offshore of either Texas or Louisiana, two states which are within the geographical limits of the Court of Appeals for the Fifth

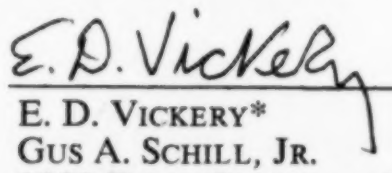
1. 46 U.S.C. §§ 761, *et seq.*

Circuit. They are involved as defendants in extensive litigation involving personal injury and/or death in not only the court below but other federal courts, and for this reason they have a significant interest in the judicial interpretations which are given to DOHSA. Therefore, your Applicants wish for the Court to have their views and reasons for the issuance of a Writ of Certiorari for the purpose of reviewing the first appellate opinion which expands the interpretation of DOHSA to include non-pecuniary losses as a measure of damages. The opinion for which review is sought is not only the initial appellate decision to permit non-pecuniary losses to survivors under DOHSA, but it is contrary to decisions from this Court and other United States Courts of Appeal.

Your Applicants have reviewed all briefs which have been filed with the court below, and they are of the opinion that an approach different from the Petitioners should be set forth in assisting this Court in the determination that a Writ of Certiorari should issue. It will be shown that reliance upon state substantive and remedial rules, as the opinion of the opinion below mandates, will produce a total lack of uniformity in the application of DOHSA, a result which the Congress intended to circumvent by affirmatively setting forth specific rules relative to the statute of limitations, contributory negligence, the survivors who were entitled to a recovery, and the measure of damages for the survivors. Your Applicants' brief also clearly demonstrates that the opinion below not only conflicts with decisions from this Court but also with decisions from the Courts of Appeal for the First, Second and Ninth Circuits.

Your Applicants respectfully move that this Court grant their motion to file the attached brief.

Respectfully submitted,



E. D. VICKERY*
GUS A. SCHILL, JR.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380
Attorneys for Applicants

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

*Counsel of Record

EXHIBIT "A"

CONSENT TO FILE AMICI CURIAE BRIEF

I am the counsel of record for Offshore Logistics, Inc. and Air Logistics. I consent on behalf of my clients to the filing of the amici curiae brief by Sonat Offshore Drilling, Inc., Global Marine, Inc., Western Oceanic, Inc., Ocean Drilling & Exploration Company, Oceaneering International Inc., Gulf Oil Corporation and Chevron Corporation.

KEITH A. JONES, Counsel of
Record for Petitioners

BRIEF IN SUPPORT OF THE ISSUANCE OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Since its enactment sixty five years ago DOHSA has been held to be the exclusive and uniform remedy for wrongful deaths beyond a marine league from the shore of a coastal state. Should chaos and uncertainty be accepted instead of the federal statute's exclusive and uniform application by replacing specific provisions of DOHSA with the various wrongful death acts of the coastal states?

Clearly not, for to do so, would mean that "Congress' solution of one problem" had created an even more difficult one.[1]

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1. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 398 (1970).

APPLICANTS' BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Applicants respectfully pray that a Writ of Certiorari issue to review the judgment and opinion rendered by the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 15, 1985, with the motion for rehearing being overruled on May 8, 1985.

STATUTE INVOLVED

The relevant portions of the Death on the High Seas Act are as follows:

Section 2, 41 Stat. 537 46 U.S.C. § 762.

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Section 7, 41 Stat. 538 46 U.S.C. § 767.

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

STATEMENT OF THE CASE

The opinion below is the first appellate decision[2] in the federal system which holds that the non-pecuniary

2. Discussed at pages 12 to 14 of this Brief.

monetary remedies of a state wrongful death action may be utilized by a decedent's survivor even if they are repugnant to the unequivocal language of the Death on the High Seas Act (hereafter referred to as DOHSA) which limits a recovery to "the pecuniary loss sustained by the persons for whose benefit the suit is brought."[3] The ramifications of this opinion are far more extensive in that explicit provisions of DOHSA are now to occupy a subordinate position to the laws of the coastal states. Essentially, the point at issue is whether the survivors of the two decedents are permitted to recover for loss of society, as well as personal sorrow and grief, pursuant to the Louisiana Wrongful Death Act,[4] even though the casualty in question occurred in a geographical area which is subject to DOHSA.

The factual background for the question before this Court involved the crash of a helicopter in the Gulf of Mexico thirty miles offshore Louisiana within the geographical area covered by DOHSA,[5] and the Outer Continental Shelf Lands Act (hereafter referred to as OCSLA).[6] The casualty did not occur within Louisiana territorial waters. The trial court restricted the recovery of the plaintiffs to the pecuniary losses which they experienced due to the deaths of Mr. Taylor and Mr. Tallentire; however, the Court of Appeals for the Fifth Cir-

3. 46 U.S.C. § 762. The full text of the statute is found at 46 U.S.C. § 761, *et seq.*

4. Sea Land Services, Inc. v. Gaudet, 414 U.S. 573, 587 n. 21 (1974), and Matter of S/S HELENA, 529 F.2d 744, 747 (5th Cir. 1976) demonstrate that Louisiana law permits these two non-pecuniary remedies.

5. 46 U.S.C. § 761 sets the geographical line for the application as being three miles from the shore of the United States.

6. 43 U.S.C. §§ 1331, *et seq.*

cuit reversed the holding by permitting a state wrongful death action to prevail over DOHSA even if the state remedies were in direct conflict with a categorical provision of the federal statute. The basis for this conclusion was an isolated and restricted reading of Section 767 of DOHSA which provides in part that any state statute which regulates rights of action or remedies for death shall not be affected by provisions of "this Chapter". The opinion does not discuss the ramifications of a state remedy or rule which contradicts a specific provision of DOHSA, and it fails to recognize the total confusion which has been introduced into an area in which the stated purpose of the statute was a uniform approach to death actions which occurred more than three miles from the shores of the United States.

REASONS FOR GRANTING THE WRIT

I.

As recognized by the strong dissent in the opinion below, the result reached by the majority is "as damaging to uniformity in wrongful death actions as it is illogical."[7] The decision to permit the application of state rules which contradict specific provisions of DOHSA destroys a uniformity which has been recognized by this Court in:

7. 754 F.2d at 1289. The concurring opinion recognized that "this result may create a mess in more than a few cases." 754 F.2d at 1289. Is the legislative history and language of Section 767 so clear as to result in a lack of uniformity, an illogical conclusion, and a decision which "may create a mess in more than a few cases"? Your applicants submit that neither the statutory language nor the legislative history brings about this result.

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978).

Moragne v. States Marine Lines, 398 U.S. 375, 397 (1970).

The two decisions from this Court support the proposition that by enacting DOHSA the Congress did not seek uniformity of rights and remedies within the state territorial waters, but a uniform application of the DOHSA remedies was required with respect to casualties which occurred on navigable waters more than three miles from the shore of a coastal state.[8]

Moragne v. States Marine Lines, 398 U.S. 375, discussed in Section III of the opinion the legislative history of DOHSA and its relationship with state law.[9] The Court set forth the legislative history of the statute as being:

> The Act (DOHSA) would accomplish that result "for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. . . . This is for the purpose of uniformity, as the States can not properly legislate for the high seas." S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R. Rep. No. 674, 66th Cong, 2d Sess., 3, 4 (1920). (parenthetical expression added).[10]

8. Sea Land Services v. Gaudet, 414 U.S. 573, 588, fn. 22 (1974) and The Tungus v. Skovgaard, 358 U.S. 588, 593 (1959) recognized that the Congress at the time DOHSA was enacted had no intention of establishing uniformity in the coastal waters in the area up to three miles from the shore. The conclusion is that uniformity was the Congressional intent once the three mile limit commenced.

9. 398 U.S. at 393-403.

10. 398 U.S. at 397.

In rejecting the vessel owner's claim that DOHSA specifically authorized the application of state laws within the territorial waters, the Court gave the following answer:

> There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States. However, respondents argue that an intent to do just that is manifested by portions of the Death on the High Seas Act quoted above (Section 767).[11] (parenthetical expression supplied)

The Court explicated this point further by stating:

> The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.[12]

In fact, *Moragne* formulated a general maritime law rule for casualties occurring within state territorial waters in order to "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial

11. *Id.* at 396.

12. 398 U.S. at 398.

statutes to exclusively maritime substantive concepts."[13] Why should tension and discrepancies be re-introduced to a maritime matter in the absence of categorical statutory language or congressional intent?

The significant portion of Congressional history supports the proposition which has been set forth in the two preceding paragraphs. The Senate Report is set forth at S. Rep. No. 216, 66th Cong., 1st Sess. (1919); and the House report is found at H.R. Rep. No. 674, 66th Cong., 2d Sess. (1920). The recorded debate is limited to the deliberations of the House of Representatives, and it is found at 59 Cong. Rec. 4482, *et seq*. The debate indicates that the purpose of the DOHSA three mile rule was to apply a uniform rule to accidents occurring on the high seas,[14] with the confusion in the course of the debate being set by Congressman Mann's amendment to Section 767 for the purpose of having the initial sentence read "[t]he provision of any state statute giving or regulating rights of action for death shall not be affected by this

13. 398 U.S. at 401.

14. "Mr. Volstead. No. If the gentleman will excuse me, my understanding is that the object of the act is to make a uniform rule for everything outside of the 3-mile limit." 59 Cong. Rec. 4482. "Mr. Montague. No; I beg the gentleman's pardon, it does not. It is intended to exclude a situation of that sort, as the chairman states, by making the law uniform." Mr. Montague also stated, "In reply to the statement of my colleague [Mr. Moore] I will say that the jurisdiction upon the subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such law is exclusive." 59 Cong. Rec. 4483. "Mr. Cullen. Then the purpose of that is to make the law uniform? It that the object of it?" "Mr. Igoe: The law is to remain as it is now, where there is a cause of action given by any State law or the decisions of the courts of those States for accidents in waters that are subject to the jurisdiction of those States. And then beyond that the State law does not apply, but this cause of action does apply." 59 Cong. Rec. 4483.

chapter."[15] Congressman Goodykoontz recognized that the sentence was incomplete with the remaining language of the section having no reference to anything in particular.[16] The debate apparently was concerned with whether the state and federal courts would have concurrent jurisdiction as opposed to extending state statutes beyond the three mile limit, but clarity is not the hallmark of this Congressional discussion. Neither the Congressional history nor the statute contain language which demonstrate that a state statute which is contrary to an explicit provision of DOHSA should prevail.

The opinion below also conflicts with *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) for reasons which

15. Mr. Mann explained the reason for his amendment in the following manner: "Mr. Mann of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody: We are very anxious to have the bill go through in its present simple form, which avoids conflict with State statutes and yet remedies a crying defect in the maritime law as administered in this country—and so forth. If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court." 59 Cong. Rec. 4484. The opinion below emphasized the next to last sentence, but in giving the emphasis failed to recognize the caveat of the last sentence "in other words" to demonstrate that the substance of the discussion related to state court jurisdiction as opposed to state substantive law.

16. 59 Cong. Rec. 4485-86.

were not reviewed by the appellate court. This Court recognized that

> The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival and damages.[17]

The Court then concludes

> In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.[18]

Acceptance of state statutes which contradict the specific terms of DOHSA in the field of monetary damages is contrary to the rule of *Higginbotham*, is destructive of a uniform approach to maritime casualties which occur outside of state territorial waters, and leads to additional anomalies which have not been reviewed.

Two examples of additional tensions between state laws and DOHSA demonstrate the destructive situations which result from the decision below insofar as litigation by the survivors is concerned. Reference is made to DOHSA's three year statute of limitations[19] and the provision that

17. 436 U.S. at 625. See also *The Law of Admiralty*, 2nd ed., Gilmore and Black (1975), at page 364 which states: "The enactment of DOHSA in 1920 apparently rendered obsolete the Supreme Court's suggestion in The Hamilton that state wrongful death statutes could be applied to deaths on the high seas."

18. *Id.*

19. 46 U.S.C. § 763 originally provided for a two year statute of limitations; however, the period was increased to three years. Pub. L. 96-382 § 1, Oct. 6, 1980, 94 Stat. 1525.

contributory negligence will not act as an automatic bar to recovery but rather is a factor in mitigation of the loss.[20] The three coastal states which comprise the Court of Appeals for the Fifth Circuit, Texas, Louisiana and Mississippi, have limitation periods which differ not only from DOHSA but from each other. Texas has a two year limitation period,[21] while the period for Louisiana is one year[22] and for Mississippi is six years.[23] Is the DOHSA three year limitation provision to be subordinate to a lesser or greater period of time due to the fortuitous circumstance of the state which is adjacent to the maritime casualty?

Also the chaos and uncertainty is compounded by reference to the Texas rule relative to the plaintiff's negligence and the conduct of the joint tortfeasors. Under DOHSA the doctrine of true comparative negligence applies. Thus any contributory negligence of a decedent would serve to reduce the amount of damages recovered by the percentage of his fault. Additionally, if two or more tortfeasors were found liable for his death, each would be jointly and severally liable for Plaintiff's total recovery. If both were solvent and able to pay, each Defendant would bear the damages based on the percentage of its fault in causing the injury. Under Texas law there can be no recovery by the survivors in the event the decedent's negligence exceeds 51%.[24] Additionally, in a joint tort-

20. 46 U.S.C. § 766. *See* legislative history at 59 Cong. Rec. 4482.

21. Article 5526 of Vernon's Texas Annotated Civil Statutes.

22. La. Rev. Civil Code, Article 3536.

23. Section 15-1-49, 5 Miss. Code (1972).

24. Section 1 of Article 2212a. of Vernon's Texas Annotated Civil Statutes.

feasor situation, if the percentage of negligence of one tortfeasor is less than the percentage of negligence found on the decedent, that tortfeasor is not jointly and severally liable for the total damages if the other tortfeasor is insolvent, but is liable only for those damages attributable to its own percentage of fault.[25]

Multiply the problems exemplified by the various rules of the coastal states for statutes of limitations, contributory fault, and the joint tortfeasor which must respond to the judgment, and it becomes obvious that a nonuniform application of the rules set forth by DOHSA will present a welter of conflicts and confusion. These are not problems, as the Respondents undoubtedly would suggest, which can or should be resolved on what is most favorable to the personal injury litigant, or stated another way, whatever produces the largest monetary award or is the most burdensome or adverse to the alleged tortfeasors. It is obvious that the Congress did not intend for these results to occur in its desire for uniformity by setting forth the specific rules to cover litigation for deaths which occur on the high seas.

25. Section 2(c) of Article 2212a. of Vernon's Texas Annotated Civil Statutes.

Assume Plaintiff is found to be 10% at fault, Defendant A is 85% at fault and Defendant B is 5% at fault with damages found to be $100,000.00. Defendant A is bankrupt. Under DOHSA and the general maritime law Plaintiff collects $90,000.00 from Defendant B, who is jointly liable, but under Texas law Plaintiff collects only $5,000.00 from Defendant B who has no joint liability under Article 2212a, Section 2(c) of the Texas statute which provides: "Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him."

This Court held in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 216 (1917), that state legislation relative to maritime matters could not be valid if it (1) contravened the essential purpose expressed by an act of Congress, *or* (2) works material prejudice to the characteristic features of the general maritime law, *or* (3) interferes with the proper harmony and uniformity of that law. Your Applicants have demonstrated that the opinion below, which recognizes a state rule even though it conflicts with DOHSA, is unacceptable due to each of the independent *Jensen* predicates.

II.

There is also a conflict on the issue of state rules and remedies being applied to the DOHSA geographical area between the opinion below and the Court of Appeals for the First Circuit in *Petition of United States,* 418 F.2d 264, 270, fn. 4 (1st Cir. 1969), the Court of Appeals for the Second Circuit in *Middleton v. Luckenbach Steamship Co.,* 70 F.2d 326, 328-329 (2nd Cir.), *cert. denied,* 293 U.S. 577 (1934), and the Court of Appeals for the Ninth Circuit in *Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77, 79-81 (9th Cir. 1983). Also prior decisions from the Court of Appeals for the Fifth Circuit are contrary to the opinion below. *See Vaz Borralho v. Keydril Co.,* 696 F.2d 379, 384 fn. 6 (5th Cir. 1983), and *Lockwood v. Astronautics Flying Clubs, Inc.,* 437 F.2d 437, 438 (5th Cir. 1971).

All of the opinions set forth above support the proposition that the rules and remedies of a state are not to be applied to a cause of action which is within the coverage of DOHSA.

The decision below recognized that its conclusion was in direct conflict with *Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77 (9th Cir. 1983). This observation is correct since the Court of Appeals for the Ninth Circuit denied a recovery for loss of society (a non-pecuniary item) pursuant to the Alaska Wrongful Death Act in a factual situation which came within the geographical area covered by DOHSA. The court in *Nygaard* stated:

> We hold, therefore, that where it is applicable, the Death on the High Seas Act preempts state wrongful death statutes. Alaska's wrongful death statute affords appellant no relief in the case before us.[26]

In another situation in which state law was not accepted for casualties covered by DOHSA, the Court of Appeals for the First Circuit stated

> It is settled that Congress intended that there be uniform construction [of the Act] without recourse to state law.[27]

Also the Court of Appeals for the Second Circuit concluded that DOHSA does not accept state law as a point of reference.[28]

The most curious aspect regarding a conflict between the opinion below and earlier decisions from various Circuit Courts of Appeal is that every prior indication

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26. 701 F.2d at 80.

27. Petition of United States, 418 F.2d 264, 270 n. 4 (1st Cir. 1969).

28. Middleton v. Luckenbach Steamship Co., 70 F.2d 326, 328 (2nd Cir.), *cert. denied,* 293 U.S. 577 (1934) stated that "since the occurrence here was on the high seas, the law of admiralty controls and rights must be governed by federal law."

from the Court of Appeals from the Fifth Circuit held that reliance upon state laws within a DOHSA context would not be permitted. Florida law on a liability issue was not permitted,[29] and the Louisiana Direct Action Statute was rejected for the purpose of naming the defendant's insurer as a party.[30] The opinion below recognized the statement in *Vaz Borralho v. Keydril Co.* that "[m]oreover, for deaths resulting from maritime torts seaward of state territorial waters, the Death on the High Seas Act likely preempts state *wrongful death* actions"[31]; however, there was no discussion of a conflict within the circuit or an attempt by the court to resolve the conflict by means of an *en banc* hearing.[32]

III.

Clarifying the effect of state statutes and decisional law relative to DOHSA is important in view of the opinion below since its acceptance of the interplay between the federal and state law results not only in a lack of uniformity but also contradictions in areas in which DOHSA makes categorical statements regarding monetary recoveries, contributory negligence, and a statute of limitations.

There is no support for the conclusion that a state wrongful death act not only supplements DOHSA but prevails over specific federal statutory provisions to the

29. Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437, 438 (5th Cir. 1971).

30. Guess v. Read, 290 F.2d 622, 625 (5th Cir. 1961).

31. 696 F.2d at 384 fn. 6.

32. Petitioners filed a suggestion for a rehearing *en banc*, but the motion was overruled.

contrary. The opposite is true if there is a conflict between a state statute and general federal maritime law,[33] a state wrongful death act and the Jones Act,[34] or a state law and federal law regarding an accident which falls within the scope of the Outer Continental Shelf Lands Act.[35] In all other areas of maritime law, the state law is subordinate, and it is erroneous to accept a contrary rule for DOHSA in the absence of unequivocal statutory language and intent.

A Writ of Certiorari should issue in this case in order to remove the state/federal tensions, and to bring about a uniform rule among the courts relative to the financial recovery which is permitted to a decedent's survivors in an instance in which the casualty occurs within the DOHSA geographical area.

CONCLUSION

A statute or decisional rule of a coastal state which conflicts with a specific provision of DOHSA cannot prevail. The decision below should be reviewed by this Court since it not only contradicts a federal maritime statute,

33. In Re Matter of S/S HELENA, 529 F.2d 744, 747-53 (5th Cir. 1976) concluded that Louisiana law which permits the recovery for personal grief on the part of the survivor would not be treated as an available remedy since it was contrary to the general maritime law. *See, Sea-Land Services v. Gaudet*, 414 U.S. 573, 585 n. 17 (1974). Note also Thompson v. The Offshore Co., 440 F. Supp. 752, 766 (S.D. Tex. 1977).

34. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

35. Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981); Continental Oil Co. v. The London Steamship Owners' Mutual Insurance Association, 417 F.2d 1030, 1035-40 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

but it introduces total non-conformity and chaos into a geographical area which the Congress intended to be the subject of uniform law.

Respectfully submitted,

E. D. Vickery

E. D. VICKERY
GUS A. SCHILL, JR.
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

CERTIFICATE OF SERVICE

I certify that on this 26th day of August, 1985, true and correct copies of the foregoing motion and brief were mailed to the following: Mr. Howard Daigle, Jr., Phelps, Dunbar, Marks, Claverie & Sims, 400 Poydras Street, New Orleans, Louisiana 70130; Mr. Keith A. Jones, Fulbright & Jaworski, 1150 Connecticut Ave., N.W. Washington, D.C. 20036; Mr. V. Farley Sonnier, Davidson, Meaux, Sonnier & McElligott, P. O. Drawer 2908, Lafayette, Louisiana 70502; and to Mr. Charles Hanemann, Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana 70360.

E. D. Vickery

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS

AMICUS CURIAE

BRIEF

MOTION FILED
SEP 10 1985

No. 85-202

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
CORRINE ANN SOUDELIER TAYLOR,
Respondent.

BEST AVAILABLE COPY

MOTION TO FILE AMICI CURIAE BRIEF AND BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN C. MCHOSE
Counsel of Record
GRAYDON S. STARING
LILLICK MCHOSE & CHARLES
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 488-7100

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

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No. 85-202

In the Supreme Court
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OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
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AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
CORRINE ANN SOUDELIER TAYLOR,
Respondent.

MOTION

Applicant, The Maritime Law Association of the United States (MLA), moves the Court for permission to file an amicus curiae brief in support of the petition for writ of certiorari filed by Offshore Logistics, Inc. and Air Logistics. Petitioners have given consent, but consent, requested by letter, has not been received from Respondents and leave to file must be sought.

The applicant has a very strong interest in the disposition of this case. The Maritime Law Association of the United States (MLA) is a nationwide bar association

founded in 1899. It has a membership of more than 3200 practicing admiralty attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association, and is represented in that Association's House of Delegates.

MLA's 2700 attorney members, most of whom are specialists in admiralty law, represent all maritime interests — shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, passengers, marine insurance underwriters and other maritime claimants and defendants.

MLA's purposes are stated in the Articles of Association:

> The objects of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices of different nations.

In furtherance of these objectives MLA, during the 86 years of its existence, has sponsored such federal maritime legislation as the Salvage Act (1912)[1], the Carriage of Goods by Sea Act (1936)[2], the Admiralty Extension Act (1948)[3], and has cooperated with Congressional committees in the formulation of other maritime legislation

[1]46 U.S.C. §§ 727-31.

[2]46 U.S.C. §§ 1300-15.

[3]46 U.S.C. § 740.

including the Water Quality Improvement Act of 1970[4], the 1972 Water Pollution Control Act Amendments[5], the statutory implementation of the 1972 Convention for Preventing Collisions at Sea[6], the Federal Court Jurisdiction Bill[7] and the United States Inland Navigation Rules[8].

MLA is participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commission on Trade Law ("UNCITRAL") and in Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization (IMO).

From time to time MLA recommended improvements in the former General Admiralty Rules of the United States Supreme Court, and in the 1960's assisted the Court's Advisory Committee on Admiralty Rules in unification of the General Admiralty Rules and the Federal Rules of Civil Procedure. The writer of this brief was a member of that Advisory Committee.

MLA has actively participated, as one of some 43 national maritime law associations constituting the Comite Maritime International[9], in the movement to

[4]33 U.S.C. §§ 1161-75.

[5]33 U.S.C. §§ 1251-1376.

[6]Text published by the Inter-Governmental Maritime Consultative Organization.

[7]S. 1876, 93rd Cong., 1st Sess.

[8]33 U.S.C. §§ 2001-73.

[9]These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany (West Germany), Greece, Iceland, India, Ireland, Israel, Italy, Japan, Korea, Mexico, Morocco, The

achieve maximum international uniformity in maritime law through the medium of international conventions, such as those relating to Assistance and Salvage (1910)[10], Ocean Bills of Lading (1924)[11], Collision (1910)[12], Limitation of Liability of Owners of Sea-Going Vessels (1957)[13], Maritime Liens and Mortgages (1968)[14], Civil Liability for Oil Pollution Damages (1969)[15] and Limitation of Liability for Maritime Claims[16].

In particular, as respects interest in this case, MLA also participated in urging the enactment of the Death on the High Seas Act[17].

MLA has long been disturbed by a tendency of state and local legislation and regulations to encroach upon the maritime field. Accordingly, at the Annual Meeting of the Association in New York in 1975, the following Resolution was unanimously adopted:

> RESOLVED, that the Maritime Law Association of the United States considers it of the utmost

---

Netherlands, Nigeria, Norway, Panama, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, Venezuela, Yugoslavia and The China Council for the Promotion of Trade.

[10]37 Stat. 1658 (1913).

[11]51 Stat. 233 (1937).

[12]6 Knauth's Benedict on Admiralty 37 (7th ed., rev.) (hereinafter "Benedict").

[13]6A Benedict 634.

[14]Singh, International Conventions of Merchant Shipping (2d Edition 1973).

[15]6A Benedict 951.

[16]1977 AMC 1607.

[17]R. M. Hughes, Death Actions in Admiralty (1921) 31 Yale Law Journal 115; 46 U.S.C. 761, et seq.

> importance and in the public interest that maritime law be uniform to the maximum extent possible throughout the United States; it is greatly concerned about, and strongly opposes the current proliferation of disparate state and local legislation adversely affecting such uniformity and advocates that Congress consider the matter and enact legislation designed to protect and maintain national uniformity in maritime law.

A substantially identical resolution was adopted by the American Bar Association at Atlanta in 1976.

MLA has, in furtherance of this resolution, filed amicus briefs in a number of cases, including two accepted by the United States Supreme Court[18].

DATED: September 4, 1985

Respectfully submitted,

JOHN C. MCHOSE,
Counsel of Record
GRAYDON S. STARING
LILLICK MCHOSE & CHARLES
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 488-7100
Attorneys for The Maritime Law Association of the United States, as Amicus Curiae

---

[18]*ASKEW v. American Waterways Operators*, 411 U.S. 325 (1973); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

No. 85-202

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
VS.
CORRINE ANN SOUDELIER TAYLOR,
Respondent.

BRIEF IN SUPPORT OF THE ISSUANCE OF A WRIT OF CERTIORARI

The Maritime Law Association of the United States (MLA) respectfully submits this Brief as amicus curiae in support of the petition for Certiorari of Offshore Logistics, Inc. and Air Logistics, a division.

QUESTION OF LAW PRESENTED

Whether a United States federal court may, in an admiralty case involving death on the high seas, apply the

wrongful death statute of a state which provides for substantive duties of care, measures of liability, or other factors different from and inconsistent with those applicable by general maritime law and the Death on the High Seas Act?

INTEREST OF AMICUS CURIAE

This is stated in the Motion which precedes this brief.

ARGUMENT

MLA supports the proposition that The Federal Death on the High Seas Act provides exclusive remedies for the deaths involved. Application of Louisiana State law allowing pecuniary damages will destroy uniformity of maritime law in the United States. MLA is concerned whenever a judicial decision threatens to destroy such uniformity, when maritime law, as is frequently the case, provides an exclusive remedy. This amicus brief is intended to emphasize the importance of this principle.

We agree with the petitioners and with the other applicants, represented by Royston, Rayzor, Vickery & Williams, by E. D. Vickery and Gus A. Schill, Jr., who have also filed a motion to be permitted to file an amicus brief in support of petitioners. This case presents an important question of federal law which should be settled by this Court for reasons stated in the pending petitions and briefs. We will avoid reiterating reasons, but wish to add comments of MLA to emphasize why, in order to maintain uniformity in maritime law in the United States, the error of the Fifth Circuit decision must be corrected. We concur in the arguments presented by petitioners and the other applicants.

The Fifth Circuit decision, if followed, will result in great disunity. Many states have death acts which differ

from the Death on the High Seas Act, as well as from death statutes enacted by other states.

The strong dissenting opinion in the Fifth Circuit recognized the majority decision "as damaging to uniformity in wrongful death actions" and the concurring opinion notes that it "may create a mess." 754 F.2d at 1289.

If Congress believes differing damages, such as those provided for by Louisiana law, should apply in an admiralty action involving deaths occurring on the high seas, The Death on the High Seas Act should be amended. Until that is done, uniformity requires that such deaths should be governed exclusively and in all respects by The Death on the High Seas Act.

The Constitution of the United States was clearly designed, in substantial part, to promote, and indeed require, national uniformity with respect to certain matters. One of these was most certainly maritime commerce, particularly operations on the high seas beyond state territorial waters. The Supremacy Clause (Article VI, Clause 2), the Commerce Clause (Article I, Section 8, Clause 3), the Admiralty Clause (Article III, Section 2, Clause 3) and the "Necessary and Proper Laws Clause" (Article I, Section 8, Clause 18) bear witness to this.

The Admiralty Clause, and the venerable line of decisions of this Court interpreting it and the Necessary and Proper Laws Clause, confirm that, except in areas of purely local concern, Congress alone may enact maritime legislation. Those decisions began with The Lottawanna, *Southern Express Co. v. Caldwell*, 88 U.S. 556 (1875), still the law. Congress' power to legislate in the maritime field charges the federal judiciary with the responsibility of defining the general maritime law which is to prevail throughout the country.

Admiralty has developed a great body of well-established law. It is essential that such law be uniform. Shipowners, and all maritime operators in the United States, are entitled to know that uniform law will apply when deaths occur on the high seas beyond territorial waters of any state.

The United States Federal Government has exclusive jurisdiction and control over interstate and foreign transportation by sea. No state may impose, prohibit, or restrict, in a manner which places a burden on such transportation. Nor can state statutes interfere with the uniformity of Maritime Law as enforced by Courts throughout the United States. Uniformity would be effectively destroyed if state legislation which varies from Federal legislation is applicable to marine operations on the high seas.

The Supreme Court has consistently recognized Federal supremacy and exclusivity in the field of substantive maritime law. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 184, 214-21 (1824); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1979).

CONCLUSION

We most respectfully urge this Honorable Court to grant the petition for certiorari.

DATED: September 4, 1985

JOHN C. MCHOSE,
Counsel of Record
GRAYDON S. STARING
LILLICK MCHOSE & CHARLES
707 Wilshire Boulevard
Los Angeles, California 90017
(213) 488-7100
Attorneys for The Maritime Law Association of the United States, as Amicus Curiae

JOINT

APPENDIX

No. 85-202

Supreme Court, U.S.
FILED
NOV 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC., *et al.*,
Petitioners,

v.

BETH A. TALLENTIRE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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JOINT APPENDIX

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311
Counsel for Petitioners

PHILIP E. HENDERSON
CHARLES HANEMANN
HENDERSON, HANEMANN & MORRIS
300 Lafayette Street
Houma, Louisiana 70360
(504) 868-2081
Counsel for Respondent Corine Ann Soudelier Taylor

V. FARLEY SONNIER
DAVIDSON, MEAUX, SONNIER & MCELLIGOTT
810 South Buchanan Street
Lafayette, Louisiana 70502
(318) 237-1660
Counsel for Respondent Beth A. Tallentire

* Counsel of Record

PETITION FOR CERTIORARI FILED AUGUST 6, 1985
CERTIORARI GRANTED OCTOBER 7, 1985

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* The district court's findings of fact and conclusions of law are set forth at Pet. App. B (*Tallentire*) and Pet. App. C. (*Taylor*). The opinion of the court of appeals is set forth at Pet. App. A.

RELEVANT DOCKET ENTRIES

(1) *Tallentire v. Offshore Logistics, Inc.*, Civ. A. 81-1364 (W.D. La.)

Date	Nr.	Proceedings
7-28-81	1	COMPLAINT (rl) #
8-10-81	14	ANSWER (Offshore Log) to amd comp (rl)
11-4-81	41-42	MOTION (Avco Lycoming) to transfer this case to E/D La for consolidation with other cases & ORDER transferring case (JMS/rl) NOE/rvw

(2) *Tallentire v. Offshore Logistics, Inc.*, Civ. A. 81-4423 (E.D. La.)

Date	Nr.	Proceedings
11-9-81	1	Avco's mtn & ORDER that case be transferred to eastern dist of la. ENT: 11-9-81
12-22-81	3	(M.E. 12-21-81) ORDERED that this case be consolidated with 80-5015 (MLS) ENT. 12-22-81
5-3-83	5	FINDINGS OF FACT & CONCLUSIONS OF LAW (MLS) dktd 5/3/83
5-28-83	7	NTC OF APPEAL by Beth A. Tallentire Pltf.

(3) *Taylor v. Air Logistics*, Civ. A. No. 80-5015 (E.D. La.)

Date	Nr.	Proceedings
12-19-80	1	COMPLAINT—Issd (1) summs.
4-22-81	7	ANSWER of deft., Air Logistics, a division of Offshore Logistics, Inc. to complt. (incorrectly identified as "Air Logistics, Inc.")
8-12-82	92	Mtn. of Air Logistics for partial summary judgment. Hrg. set before MLS on 9-8-82 at 9 A.M.

Date	Nr.	Proceedings
9-8-82	101	Hrg. on Mtn. of Deft. for partial summary judgment—GRANTED. (MLS) DKTD. 9-8-82
11-5-82	120	PRE-TRIAL ORDER (MLS) DKTD. 11-5-82
11-15-82	126	NONJURY TRIAL—witnesses heard, exhibits offered, ct recesses until 11-16-82 at 10 a.m. (MLS) dktd 11-15-82 Mtn. of Offshore to sequest all witnesses—GRANTED
11-16-82	135	NON JURY TRIAL: Witnesses heard (MLS) dktd 11-19-82 (*SUBMITTED*)
4-21-83	145	FINDINGS OF FACT & CONCLUSIONS OF LAW (MLS) dktd 4/21/83. (Jdgmt in favor of pltf. & against defts.)
5-31-83	152	PLTF'S NOTICE OF APPEAL.
6-6-83	153	Air Logistics & Offshore Logistics' NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No: 811364
SEC. S

BETH A. TALLENTIRE

versus

OFFSHORE LOGISTICS, INC. and BELL HELICOPTER DIVISION OF TEXTRON, INC.

[Filed July 28, 1981]

COMPLAINT

The complaint of BETH A. TALLENTIRE, widow of James Dennis Tallentire, avers:

1.

Complainant herein is a resident of the full age of majority of the State of Pennsylvania and has been appointed as personal representative of the decedent, James Dennis Tallentire.

2.

Defendant, Offshore Logistics, Inc. is a Louisiana corporation with its principal place of business in Lafayette, Louisiana who can be served through its designated agent for service of process, namely Phelps, Dunbar & Marks, 1300 Hibernia Bank Building, New Orleans, Louisiana 70112.

3.

Bell Helicopter division of Textron, Inc. is a Delaware corporation with its principal place of business in the State of Texas and can be served through the C. T. Corporation System, its agent for service of process.

4.

On or about August 6, 1980 James Dennis Tallentire was a passenger aboard a helicopter owned by Offshore Logistics, Inc. and manufactured by Bell Helicopter division of Textron, Inc.

5.

Suddenly and without warning the helicopter crashed into the navigable waters of the Gulf of Mexico off the Coast of Louisiana at a point approximately four miles west of Ship Shoal Block 154.

6.

As a consequence thereof James Dennis Tallentire died of multiple injuries.

7.

Complainant avers that the decedent, James Dennis Tallentire, had no supervision or control over the maintenance, operation or performance of the helicopter but was only a passenger thereon.

8.

Complainant avers that the crash of the subject helicopter and the resulted death of James Dennis Tallentire was caused by fault and/or neglect on the part of Offshore Logistics, Inc. in respect to the operation and/or maintenance of the aircraft. Alternatively, complainant avers that the crash of the helicopter was caused by a defect in the manufacture and/or design of the helicopter by Bell Helicopter division of Textron, Inc.

9.

That because the crash occurred on the navigable waters of the United States of America the claims of your complainant are governed by the general maritime law and/or the Death on the High Seas Act and/or the laws of the adjacent state, the State of Louisiana.

10.

As a consequence of the death of James Dennis Tallentire your petitioner has suffered damages in the sum of FIVE MILLION AND 00/100 ($5,000,000.00) DOLLARS plus legal interest thereon from August 6, 1980.

11.

Complainant on the one hand, and defendants, on the other hand, are residents of different states and the amount in controversy exceeds TEN THOUSAND DOLLARS and there is, therefore, diversity of citizenship jurisdiction.

12.

Your complainant requests trial by jury on all issues of this cause.

WHEREFORE, premises considered, petitioner prays that after due proceedings are had there be judgment in favor of complainant and against defendants in the full sum of FIVE MILLION AND 00/100 ($5,000,000.00) DOLLARS plus legal interest thereon from August 6, 1980 and all cost of this action.

DAVIDSON, MEAUX,
SONNIER & ROY

By: /s/ V. Farley Sonnier,
V. FARLEY SONNIER,
Attorneys for
Beth A. Tallentire
P.O. Drawer 2908
Lafayette, LA 70502
(318) 237-1660

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Civil Action No. 811364

SECTION "S"

BETH A. TALLENTIRE

versus

OFFSHORE LOGISTICS, INC. and BELL HELICOPTER DIVISION OF TEXTRON, INC.

[Filed Aug. 10, 1981]

ANSWER AND DEFENSES TO PLAINTIFF'S COMPLAINT AS FIRST AMENDED

NOW INTO COURT, through undersigned counsel, comes defendants, Offshore Logistics, Inc. and its division Air Logistics, who for answer to the plaintiff's Complaint, as first amended, states as follows:

FIRST DEFENSE

The Complaint, as First Amended, fails to state a claim against defendants for which relief may be granted.

SECOND DEFENSE

This action has been brought before a court of improper venue.

THIRD DEFENSE

Now specifically answering the numbered allegations of the plaintiff's Complaint, as First Amended, defendants aver:

1.

The allegations of Paragraph 1 are denied for lack of information sufficient to justify a belief therein.

2.

The allegations of Paragraph 2 are denied as stated, except to admit that Offshore Logistics, Inc. is a corporation organized under the laws of the State of Louisiana which has appointed agents for service of process in this State.

2a.

The allegations of Paragraph A of the plaintiff's First Amended Complaint are denied as stated, except to admit that Air Logistics is a division of Offshore Logistics, Inc.

3.

The allegations of Paragraph 3 require no answer from these defendants.

4.

The allegations of Paragraph 4 are denied as stated, except to admit on information and belief that James Dennis Tallentire was a passenger aboard a helicopter being operated by Air Logistics, a division of Offshore Logistics, Inc., on 6 August 1980.

5.

The allegations of Paragraph 5 are denied as stated, except to admit that the aircraft failed to arrive at its scheduled landing site and wreckage of the aircraft was subsequently recovered in the waters of the Gulf of Mexico.

6.

The allegations of Paragraph 6 are denied as stated, except to admit on information and belief that James Dennis Tallentire died as a result of the helicopter accident.

7.

The allegations of Paragraph 7 are denied as stated, except to admit that James Dennis Tallentire was not an employee of Air Logistics, a division of Offshore Logistics, Inc. and, therefore, was not expected to have any control or supervision over the maintenance, operation or performance of the helicopter in question.

8.

The allegations of Paragraph 8 are denied as they may relate to Offshore Logistics, Inc. and its division Air Logistics.

9.

The allegations of Paragraph 9 are denied as stated, except to admit that as the death of James Dennis Tallentire occurred on the navigable waters of the High Seas, the claim for his death and the remedies afforded for his death lie exclusively within the provisions of the Death on the High Seas Act.

10.

The allegations of Paragraph 10 are denied.

11.

The allegations of Paragraph 11 state mere conclusions of law and therefore require no answers from these defendants; however, out of an abundance of caution, those allegations are denied as stated.

12.

The allegations of Paragraph 12 are denied.

FOURTH DEFENSE

Defendants specifically aver that they are in no way responsible to the plaintiff for the damages alleged, and further aver that the accident giving rise to this suit was caused by the acts, omissions, fault, or negligence of others over which Offshore Logistics, Inc. and its division Air Logistics have no authority or control and for whom Offshore Logistics, Inc. and its division Air Logistics have no responsibility.

FIFTH DEFENSE

In the alternative, defendants aver that the accident giving rise to this suit was caused by an act of God for which no one can be legally responsible.

WHEREFORE, Offshore Logistics, Inc., and its division Air Logistics, pray that after due proceedings herein, there be judgment dismissing the plaintiff's Complaint, as First Amended, with prejudice and at plaintiff's costs. Defendants further pray for all general and equitable relief.

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

By: /s/ Howard Daigle, Jr.
HOWARD DAIGLE, JR.
ESMOND PHELPS, II
HARRY S. REDMON, JR.
1300 Hibernia Bank Building
New Orleans, Louisiana, 70112
Telephone: (504) 566-1311
Attorneys for
Offshore Logistics
and Its Division
Air Logistics

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-5015
SECT. H MAG. 3

CORINE ANN SOUDELIER TAYLOR, INDIVIDUALLY, AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL JOHN TAYLOR, AND AS NATURAL TUTRIX OF THE MINOR, LESLIE ANN TAYLOR

versus

AIR LOGISTICS, INC.

[Filed Dec. 19, 1980]

COMPLAINT

The complaint of Corine Ann Soudelier Taylor represents:

1.

Plaintiff is a citizen of Louisiana.

2.

At all material times, plaintiff was the wife of Michael John Taylor, hereinafter referred to as the decedent.

3.

Of the marriage between the plaintiff and the decedent, there was born one child, Leslie Ann Taylor, on July 20, 1970.

4.

The plaintiff is the natural tutrix of the said minor and the personal representative of the decedent.

5.

This court has jurisdiction of this cause under its general maritime jurisdiction, under the Death on the High Seas Act, and by reason of diversity of citizenship, all as set forth below.

6.

The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

7.

The defendant, Air Logistics, Inc., is a corporation, and a citizen of a state other than Louisiana, but does business in Louisiana.

8.

On August 6, 1980, the defendant owned and maintained a certain helicopter, model Bell 205A, registration No. N95AL, and operated the said helicopter for hire to carry passengers.

9.

On August 6, 1980, the decedent was a passenger in the said helicopter.

10.

On the afternoon of August 6, 1980, the said helicopter crashed into the Gulf of Mexico, as a direct and proximate result of the fault and negligence of the defendant, and as a result of the defendant's breach of its express and implied warranties of fitness, airworthiness, and workmanlike performance.

11.

As a direct and proximate result of the said crash, the decedent died.

12.

Individually, as personal representative of the estate of the decedent, and as natural tutrix of the said minor,

the plaintiff is entitled to recover of the defendant damages in the sum of Five Million ($5,000,000.00) Dollars, for the conscious pain and suffering of the decedent, physical and mental, funeral expenses, grief, loss of consortium, loss of support, loss of services, loss of society, loss of love, loss of affection, loss of nurture, and loss of guidance, and such other items of damages as may be proved at the trial.

13.

Plaintiff is entitled to and prays for trial by jury.

WHEREFORE, Plaintiff, Corine Ann Soudelier Taylor, individually, as personal representative of the decedent, Michael John Taylor, and as natural tutrix of the minor, Leslie Ann Taylor, prays that there be judgment in her favor and against the defendant, Air Logistics, Inc. in the full sum of Five Million ($5,000,000.00) Dollars, for trial by jury, for legal interest, and for costs of action.

/s/ Charles Hanemann
CHARLES HANEMANN
of
HENDERSON, HANEMANN & MORRIS
A Professional Law Corporation
Attorneys for Plaintiff
300 Lafayette Street
Houma, Louisiana 70360
Telephone: 504/868-2081 or
504/581-1434

PLEASE SERVE:

Defendant, AIR LOGISTICS, INC.,
through its agent for service
of process, PAUL M. HAYGOOD
1300 Hibernia Building
New Orleans, Louisiana 70112

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-5015

SECTION H(3)

CORINE ANN SOUDELIER TAYLOR, INDIVIDUALLY, AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL JOHN TAYLOR, AND AS NATURAL TUTRIX OF THE MINOR, LESLIE ANN TAYLOR

versus

AIR LOGISTICS, INC.

[Filed April 22, 1981]

ANSWER AND DEFENSES

NOW INTO COURT, through undersigned counsel, comes defendant, Air Logistics, a division of Offshore Logistics, Inc. (incorrectly identified as "Air Logistics, Inc."), who for answer to the plaintiff's Complaint states as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant for which relief may be granted.

SECOND DEFENSE

Now, specifically answering the numbered allegations of the Complaint, Air Logistics avers as follows:

1.

The allegations of Paragraphs 1, 2, 3, 4, 5, 6, and 11 are denied for lack of information sufficient to justify a belief therein.

2.

The allegations of Paragraph 7 are denied, except to admit that Air Logistics is a division of Offshore Logistics, Inc. which is a Louisiana corporation with its principal place of business in Lafayette, Louisiana.

3.

The allegations of Paragraph 8 are denied, except to admit that on 6 August 1980, Air Logistics operated a Bell 205A aircraft with registration number N95AL.

4.

On information and belief, the allegations of Paragraph 9 are admitted.

5.

The allegations of Paragraphs 10, 12 and 13 are denied.

THIRD DEFENSE

Defendant denies that it is in any way responsible to the plaintiff for the damages alleged in her Complaint. Defendant specifically avers that any such damages were caused by the acts, omissions, negligence or fault of others over which this defendant has no authority or control, and for whom this defendant has no responsibility.

FOURTH DEFENSE

In the alternative, defendant avers that the decedent knowingly and voluntarily assumed the risk and hazards of his employment, which would include, but not be limited to, the risk and hazards of helicopter transportation to and from his offshore work location.

FIFTH DEFENSE

Defendant specifically denies that plaintiff is entitled to a trial by jury.

WHEREFORE, Air Logistics, a division of Offshore Logistics, Inc., prays that after due proceedings herein, there be judgment dismissing the plaintiff's Complaint with prejudice and at plaintiff's cost. Defendant further prays for all general and equitable relief.

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

By: /s/ Howard Daigle, Jr.
HOWARD DAIGLE, JR.
ESMOND PHELPS, II
HARRY S. REDMON, JR.
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: (504) 566-1311
Attorneys for
Air Logistics,
a Division of
Offshore Logistics, Inc.

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 80-5015
and consolidated cases
SECTION "G"

CORINE ANN SOUDELIER TAYLOR, ETC., *et al.*

versus

AIR LOGISTICS, INC.

[Filed Aug. 12, 1982]

RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW INTO COURT, through undersigned counsel, comes Air Logistics, a division of Offshore Logistics, Inc., who moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment as to the asserted claims by the consolidated plaintiffs grounded on Louisiana substantive law or general maritime law.

PHELPS, DUNBAR, MARKS,
CLAVERIE & SIMS

By: /s/ Esmond Phelps, II
ESMOND PHELPS, II
HOWARD DAIGLE, JR.
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: (504) 566-1311
Attorneys for
Air Logistics,
a Division of
Offshore Logistics, Inc.

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

No. 80-5015

CORINE ANN SOUDELIER TAYLOR, INDIVIDUALLY,
AS ADMINISTRATRIX OF THE ESTATE OF
MICHAEL JOHN TAYLOR, AND AS NATURAL TUTRIX
OF THE MINOR-LESLIE ANN TAYLOR,
Plaintiffs

v.

AIR LOGISTICS, INC.,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Defendants

JUDGE SEAR PRESIDING
Wed. Sept. 8, 1982

DEFT'S RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT

Counsel Present

JACK BENJAMIN, ESQ.
FARLEY SONIER, ESQ.
HARRY REDMON, JR., ESQ.
ALAN A. ZAUNBRECHER, ESQ.
SCOTT STAINS, ESQ.
L PHELPS GAY, ESQ.

ARGUED

DEFT'S MOTION FOR
PARTIAL JUDGMENT GRANTED

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
CORINE ANN SOUDELIER TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether state wrongful death statutes may be enforced on the high seas notwithstanding the availability of a uniform federal remedy under the Death on the High Seas Act.*

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* The caption of the case in this Court contains the names of all parties to the proceeding in the court of appeals.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-202

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 754 F.2d 1274. The opinions of the district court (Pet. App. B and Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1985. A timely suggestion of rehearing *en banc* was denied on May 8, 1985 (Pet. App. D). The

petition for a writ of certiorari was filed on August 6, 1985, and granted on October 7, 1985. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, section 2, of the Constitution of the United States in pertinent part provides:

> The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .

Article VI, clause 2, of the Constitution of the United States in pertinent part provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

The Death on the High Seas Act, 46 U.S.C. §§ 761 *et seq.* (1982), and the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985), are set forth at Pet. App. E.

STATEMENT

This case arises out of the fatal crash of a helicopter on the high seas. The helicopter went down approximately thirty-five miles from land while flying from an offshore drilling platform on the Gulf of Mexico to Houma, Louisiana. All persons on board died in the crash.

The plaintiffs, Beth Tallentire and Corine Taylor, are the surviving wives of two of the passengers. Defendant Air Logistics, a division of Offshore Logistics, Inc. (hereinafter referred to as "Offshore Logistics"), owned the helicopter and was operating it at the time of the crash. Plaintiff Tallentire resides in Pennsylvania; plaintiff Taylor resides in Louisiana; Offshore Logistics is a Louisiana corporation. Pet. App. 6a n.6. The plaintiffs' actions were consolidated and tried in the United States District

Court for the Eastern District of Louisiana.[1] The court asserted jurisdiction under 28 U.S.C. § 1333(1) (1982) ("any civil case of admiralty or maritime jurisdiction"). Pet. App. 46a, 66a.

The plaintiffs made claims against Offshore Logistics under, *inter alia*, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 761 *et seq.* (1982), and the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (Supp. 1985). The two statutes differ significantly in the measure of damages allowed. DOHSA provides "fair and just compensation for . . . pecuniary loss." 46 U.S.C. § 762. The Louisiana wrongful death statute additionally permits recovery for nonpecuniary losses, "includ[ing] loss of consortium, service, and society." La. Civ. Code Ann. art. 2315(B).

Offshore Logistics moved for partial summary judgment, asking the district court to strike all claims except those for pecuniary loss under DOHSA. J.A. 16. The court granted the motion, thereby holding that DOHSA provides the exclusive remedy for death on the high seas. J.A. 17.[2] Offshore Logistics admitted liability, and trial was limited to a determination of the plaintiffs' pecuniary losses. On appeal, the plaintiffs argued that they should have been permitted to recover damages for nonpecuniary losses as well.

The court of appeals, with one judge specially concurring and one judge dissenting, "reverse[d] the district court's denial of benefits recoverable under Louisiana law." Pet. App. 2a. The court determined at the outset that admiralty jurisdiction does not extend to a cause of action predicated upon state law. *Id.* at 6a n.6.

---

[1] The *Tallentire* action was filed in the Western District of Louisiana and then transferred to the Eastern District where it was consolidated with the *Taylor* action. J.A. 1.

[2] The Jones Act, 46 U.S.C. § 668 (1982), provides a separate remedy for seamen, but that statute is not at issue here.

Considering the matter as one lying outside the scope of admiralty, the court then reasoned as follows: Louisiana has legislative jurisdiction to establish liability for acts committed by a Lousiana resident or corporation on the high seas, *id.* at 18a-23a; Louisiana exercised that legislative jurisdiction when it enacted article 2315, *id.* at 23a-24a; and, under the standards appropriate for cases arising under the Commerce Clause, such state legislation is not foreclosed or preempted by federal law, *id.* at 8a-18a.

The court of appeals rejected the argument that this Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), "forecloses supplementation of DOHSA by state statutes." Pet. App. 14a. The court determined, to the contrary, that such supplementation is required by section 7 of DOHSA, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. § 767. Accordingly, the court vacated and remanded for trial of the claims asserted under the Louisiana wrongful death statute, indicating that they were to be tried pursuant to diversity jurisdiction in *Tallentire* and pendent jurisdiction in *Taylor*. Pet. App. 6a n.6; *see also id.* at 24a.

In his special concurrence, Judge Jolly expressed serious reservations:

> The result we reach in this case creates significant problems in the field of maritime law because it defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas. . . .
>
> [T]his result may create a mess in more than a few cases.

Pet. App. 28a-29a.

Judge Garza, in his dissent, argued that the majority had misread section 7 of DOHSA:

> Historically, state wrongful death actions provided the remedy for deaths occurring on territorial waters. . . . [S]ection 7 preserved the then existing state law remedies available for deaths on territorial waters. It did not then, and does not now, expand the exclusive remedy [for deaths on the high seas] created by DOHSA.

Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

1. This is an admiralty case. Admiralty law "derive[s] its force from the National Government and [is] part of the laws of the United States." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 378 (1959). State law does not operate of its own force in admiralty. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). State remedies do not extend to the high seas by sheer force of state tort law. *Messel v. Foundation Co.*, 275 U.S. 427, 434 (1927).

This is not to say that tort claims predicated upon state law always are excluded in admiralty. But state tort law applies in admiralty only by federal permission, through a process of selective borrowing. In the absence of federal legislation, and when the general maritime law is silent, an admiralty court may (but need not) borrow from state law in order to provide a rule of decision. *Lindgren v. United States*, 281 U.S. 38, 43 (1930); *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921). The question presented here is whether, in the presence of a federal statute—the Death on the High Seas Act—an admiralty court may borrow from state law in order to supply a supplemental rule of decision for cases involving wrongful death on the high seas.

2. Because DOHSA prescribes a uniform remedy for death on the high seas, it is neither necessary nor appropriate for admiralty courts to borrow from state law in order to supply supplemental remedies. DOHSA tra-

ditionally has been understood to preclude such borrowing. Gilmore & Black, *The Law of Admiralty* 364 (2d ed. 1975). From the enactment of DOHSA in 1920 until the decision below in this case, not a single appellate court had approved the enforcement of state wrongful death statutes on the high seas.

This Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), confirmed that DOHSA provides the exclusive remedy for wrongful death on the high seas. That decision disposes of this case as well. The meaning of *Higginbotham* is that DOHSA precludes admiralty courts from providing supplemental remedies for wrongful death on the high seas, whether through the fashioning of general maritime rules or the adoption of state law. This Court broadly instructed that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements." 436 U.S. at 625. In doing so, the Court cited with approval decisions by lower courts refusing to adopt and apply state wrongful death statutes as supplements to DOHSA on the high seas. And the Court explicitly stated its understanding that, following its decision, a single "national rule [would govern] accidents farther from land [*i.e.*, on the high seas]." *Id.* at 624 n.18.

In short, *Higginbotham* stands for the proposition that DOHSA, like the Jones Act, is a federal statute "of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Lindgren*, 281 U.S. at 44.

3. The court below nevertheless believed that section 7 of DOHSA requires enforcement of state wrongful death statutes on the high seas. But section 7 "is a mere saving clause, and does not give the statutes any

effect that they did not have regardless of it." Hughes, *Death Actions in Admiralty*, 31 Yale L. J. 115, 123 (1921). Section 7 was "put in out of abundant caution to calm the minds of those who think that rights within the territorial waters will be usurped by the national law." 59 Cong. Rec. 4483 (Mar. 17, 1920) (Rep. Montague). It does not command admiralty courts to borrow from state law in adjudicating cases of wrongful death on the high seas.

Nor did Congress intend to issue any such command. The enactment of DOHSA represented the culmination of years of legislative effort, prompted by widespread dissatisfaction with the application of state wrongful death statutes on the high seas. *Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88 (N.D. Cal. 1954). Congress' purpose was to supply a federal remedy for wrongful death on the high seas that would be both uniform and exclusive. S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3-4 (1920).

That purpose was not abandoned when the House of Representatives adopted a last-minute amendment offered by Representative Mann. That amendment apparently had been offered out of a confusion of motives—a concern that state law otherwise would not apply to deaths that occurred in large inland lakes or in juridical and historic bays, and a desire to preserve the jurisdiction of state courts over suits for wrongful death occurring within state legal boundaries. If Representative Mann more broadly intended to require enforcement of state law on the high seas, there is no evidence that his intention was fully understood, let alone generally shared, by other members of the House. There is no suggestion in the floor debate that the House as a whole intended to upset the compromise that had been achieved after years of legislative effort and to defeat the underlying

objective and stated purpose of establishing a uniform and exclusive federal remedy for death on the high seas.

4. Enforcement of state wrongful death statutes on the high seas would make a mockery of the constitutional policy of maritime uniformity. State duties of care differ significantly from those imposed by the general maritime law. State rules of recovery for wrongful death differ from DOHSA, and from one another, on such fundamental issues as available defenses, measures of damages, eligible beneficiaries, and periods of limitation.

Adoption of state law would raise serious and difficult choice-of-law problems and would result in nonuniformity from state to state, from tortfeasor to tortfeasor, from decedent to decedent, and from survivor to survivor. It also would result, paradoxically, in enforcement of a single national rule in territorial waters but application of an unpredictable overlay of conflicting state rules on the high seas—"a result as damaging to uniformity in wrongful death actions as it is illogical." *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983). As the court below admitted, its decision in this case most definitely "does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades." Pet. App. 17a.

On the high seas, especially, there is little excuse for nonuniformity. Admiralty courts need not give substantial weight to state interests in fashioning federal rules of governance for the high seas. *Cf. Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 420-21 (1976). Moreover, enforcement of state law on the high seas would renew "the tensions and discrepancies that . . . resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970). *See also* Gilmore & Black, *supra*,

at 365-67. DOHSA provides a uniform rule for the high seas, and there is no need or reason to depart from it.

ARGUMENT

STATE WRONGFUL DEATH STATUTES MAY NOT BE ENFORCED ON THE HIGH SEAS

A. In Admiralty, State Tort Law Operates Only By Federal Permission, Through A Process of Selective Borrowing

The fundamental flaw in the decision below lies in the Fifth Circuit's failure to treat this as an admiralty case. The court of appeals reasoned that state claims for wrongful death under Louisiana law could be tried in federal court only pursuant to diversity or pendent jurisdiction. Pet. App. 6a n.6. Putting aside for the moment the question whether the state claims in fact may be maintained, the court was badly mistaken in its belief that because those claims are rooted in state law they fall outside federal admiralty jurisdiction.

Admiralty jurisdiction rests not upon the plaintiff's legal theory but upon the underlying facts. *See Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 674-77 (1982). A plaintiff may not evade admiralty merely by purporting to elect a state cause of action. *E.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382-84 (1918). In particular, a claim for wrongful death at sea lies within the admiralty jurisdiction even if recovery is sought under state law. *See, e.g., Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

It is necessary to emphasize this point, for more is involved here than merely identifying the source of the district court's power to hear the case. "[I]n the law of admiralty, the term 'jurisdiction' denotes both the power of a court to hear and dispose of a certain controversy, and also the power to prescribe rules of decision to be

applied by those courts considering the controversy." Swain, *Yes, Virginia, There Is An Admiralty: The* Rodrigue *Case*, 16 Loy. L. Rev. 42 (1969-70). *See also Foremost Insurance*, 457 U.S. at 685 (Powell, J., dissenting). By conferring on the federal judiciary "all Cases of admiralty and maritime Jurisdiction," Article III, section 2, of the Constitution allocates both of those powers to the national government. Admiralty law therefore is federal law. "Maritime law [is] federal law based on a constitutional grant of jurisdiction. . . . [It] derive[s] its force from the National Government and [is] part of the laws of the United States." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 378 (1959).

State tort law does not operate of its own force in admiralty. This Court made that clear more than a century ago:

> One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states . . . .

The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1875). Accordingly, "admiralty jurisdiction [is] one of the areas long recognized as subject to federal common law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). "[T]he supremacy of federal common law is an accepted postulate in maritime cases today . . . ." Currie, *Federalism and The Admiralty: "The Devil's Own Mess,"* 1960 Sup. Ct. Rev. 158, 164. Where federal common law applies, as in admiralty, "state statutes or decisions are not conclusive." *Illinois v. Milwaukee*, 406 U.S. 91, 105 (1972).[3]

[3] The situation with respect to criminal law is, of course, somewhat different. "The criminal jurisdiction of the United States is wholly statutory." *United States v. Flores*, 289 U.S. 137, 151 (1933). Congress has enacted statutes proscribing the basic crimes against person and property, *see, e.g.*, 18 U.S.C. §§ 113, 661, 1111, and 1363, but it has not passed a fully comprehensive criminal code for the admiralty and maritime jurisdiction. Consequently, a state may prosecute its citizens for violations of the state's criminal statutes committed in territorial waters or on the high seas "[w]hen its action does not conflict with federal legislation." *Skiriotes v. Florida*, 313 U.S. 69, 78-79 (1941).

The inherently federal nature of admiralty was confirmed in a case involving the very same Louisiana statute upon which the plaintiffs rely here. In *Messel v. Foundation Co.*, 274 U.S. 427 (1927), the plaintiff, who had been injured in Louisiana's territorial waters, brought suit in state court for personal injury, asserting a claim for recovery under article 2315. This Court held that although the suit could be maintained in state court, "[t]he principles applicable to Messel's recovery, should he have one, must be limited to those which the admiralty law of the United States prescribes . . . ." *Id.* at 434. *See also, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922). *Cf.* Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 421-22 (1964) ("state courts must follow federal decisions on subjects within national legislative power where Congress has so directed or the basic scheme of the Constitution demands"). In short, state remedies do not extend to the high seas by sheer force of state tort law.

This is not to say that tort claims predicated upon state law always are excluded in admiralty. To the contrary, federal courts sitting in admiralty sometimes have chosen to incorporate state statutes or rules of decision into federal admiralty law. But state tort law applies in admiralty only by federal permission, through a process of selective borrowing when no more general federal rule has been fashioned or prescribed. *See generally*, Hart & Wechsler,

The Federal Courts and The Federal System 817-21 (2d ed. 1973).

Where state statutes have been enforced in admiralty, "such statutes 'were not a part of the general maritime law' and were recognized only because Congress had not legislated on the subject." *Lindgren v. United States*, 281 U.S. 38, 44 (1930). Nor are state statutes automatically adopted in the absence of a federal statute. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731, 741-42 (1961) (refusal to adopt state statute of frauds). Where Congress has remained silent, admiralty courts may choose either to fashion a federal common law rule or to adopt state law. *See Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981); *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347-49 (1937). The fashioning of a federal common law rule precludes adoption of state law. *See Chelentis*, 247 U.S. at 382 ("no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law"). In the absence of a federal statute, moreover, a court may both decline to fashion a federal common law rule and refuse to apply state law—for the absence of a rule itself can be a rule. *See, e.g., Hess v. United States*, 361 U.S. 314, 330 (1960) (Harlan, J., dissenting); *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285-86 (1952); *Union Fish Co. v. Erickson*, 248 U.S. 308, 313-14 (1919). *Cf. D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 471 (1942) (Jackson, J., concurring) ("A federal court sitting in a nondiversity case . . . does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state").

Because it disregarded these principles, the court below misconceived the issue before it. The court of appeals

treated the case as involving a question of preemption of the type routinely encountered in cases under the Commerce Clause. But the issue is not, as the Fifth Circuit erroneously believed, whether the Death on the High Seas Act leaves room for the parallel exercise of state legislative jurisdiction, *i.e.*, whether DOHSA permits state tort law to apply of its own force on the high seas. The constitutional allocation of admiralty and maritime jurisdiction to the national government itself forecloses that result. Instead, the question that must be decided in this case is whether, after the enactment of DOHSA, it is necessary and appropriate for admiralty courts to borrow from state law in order to supply supplemental remedies for wrongful death on the high seas.

B. The Enactment Of A Uniform Federal Remedy For Wrongful Death On The High Seas Made It Unnecessary And Inappropriate For Admiralty Courts To Borrow From State Law In Order To Supply Supplemental Remedies

1. *DOHSA Traditionally Has Been Understood As Precluding Adoption Of Supplemental State Remedies*

The Death on the High Seas Act represented a delayed legislative reaction to the decisions in *The Harrisburg*, 119 U.S. 199 (1886), and *The Hamilton*, 207 U.S. 398 (1907). In *The Harrisburg*, the Court had refused to recognize an action for wrongful death "under the general maritime law." 119 U.S. at 213. In *The Hamilton*, after referring to the result in *The Harrisburg* and observing that "Congress has remained silent," 207 U.S. at 404, the Court applied a Delaware statute "in the admiralty," *id.*, as a basis for imposing liability upon a Delaware corporation for wrongful deaths on the high seas. Thus, *The Hamilton* was an early illustration of the practice whereby "in admiralty, the courts may look to state law for supplemental doctrines." Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1525 (1969).

Reliance upon state law as a remedy for deaths on the high seas, however, proved unsatisfactory for many reasons. Inherent limitations on state legislative jurisdiction, conflicting state legal standards, and the absence of any clear rules governing choice of law produced confusion and sometimes resulted in the denial of any recovery for wrongful death at all:

> This [led to] agitation . . . for a federal statute affording a right of action for wrongful death occurring within the admiralty jurisdiction. The earliest bills submitted to the Congress provided a uniform and exclusive federal right of action for all navigable waters. Since local practitioners felt that their own state statutes should govern actions for death occurring on state waters, these bills met with a luke-warm reception. . . .
>
> To avoid further opposition of this nature, the Maritime Law Association, which had been one of the principal advocates of the federal statute, in 1915, prepared a bill providing a uniform federal right of action solely for the high seas, and leaving the operation of state statutes unimpaired on territorial waters.

Wilson v. Transocean Airlines, 121 F. Supp. 85, 88-89 (N.D. Cal. 1954) (footnotes omitted).

These efforts led in 1920 to the enactment of DOHSA, establishing a cause of action "in admiralty" for any wrongful death "occurring on the high seas beyond a marine league from the shore of any State." 46 U.S.C. § 761. From its very inception, this statute has been widely understood as completely displacing state wrongful death statutes on the high seas. *See* Magruder and Grout, *Wrongful Death within the Admiralty Jurisdiction*, 35 Yale L. J. 395, 416 (1926) ("the Federal Death Act of 1920 . . . superseded the state death acts so far as they theretofore applied to wrongful deaths on the high seas").

More than thirty years after enactment, it could still be said that "in all the years that have elapsed since the passage of the Death on the High Seas Act, it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the state wrongful death statutes as to actions for death occurring on the high seas." *Wilson v. Transocean Airlines*, 121 F. Supp. at 91. Indeed, this view remained virtually unanimous for more than sixty years after the enactment of DOHSA —a truly remarkable record of consistency. *See Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983) ("the Death on the High Seas Act preempts state wrongful death statutes"); *Barbe v. Drummond*, 507 F.2d 794, 801 n.10 (1st Cir. 1974) ("[i]t would be possible to interpret [DOHSA] to allow a state wrongful death statute to operate where the death occurs on the high seas but the better authority rejects this view"); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388 (3d Cir. 1971) ("the need for uniformity requires that [DOHSA] supersede any state wrongful death statute"). *See also, e.g.*, Note, *Maritime Wrongful Death After* Moragne: *The Seaman's Legal Lifeboat*, 59 Geo. L. J. 1411, 1417 (1971) ("the Act was intended to supersede the application of state statutes in high seas wrongful death actions"); Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L. Rev. 648, 651 (1964) ("the DHSA . . . supersed[ed] the state statutes on the high seas").

2. *This Court's Decision in* Higginbotham *Confirms That Admiralty Courts May Not Supply Supplemental Remedies For Wrongful Death On The High Seas*

DOHSA settled the law of wrongful death only for the high seas. Admiralty courts continued to adopt and apply state wrongful death statutes in territorial waters after 1920, because territorial waters were "untouched" by DOHSA and maritime torts occurring in such waters are

"local in character." *Western Fuel Co.*, 257 U.S. at 240, 242. This practice, however, posed numerous difficulties. Wrongful death statutes differ from state to state; the standards of care and other limitations and conditions imposed or incorporated by such statutes in many cases are quite different from the traditional rules of admiralty; and it is by no means a simple task even to determine how a state's law should apply in a maritime context. *See generally* Currie, *supra*, 1960 Sup. Ct. Rev. at 193-202. To overcome these difficulties, this Court in *Moragne v. States Marine Lines*, 398 U.S. 375, 409 (1970), "overrule[d] *The Harrisburg*, and h[e]ld that an action does lie under general maritime law for death caused by violation of maritime duties." The Court explained that "[o]ur recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." *Id.* at 401.

The general maritime remedy for wrongful death recognized in *Moragne*, unlike the remedy prescribed by DOHSA, permits recovery of pecuniary losses. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-90 (1974). Because of this, the plaintiffs in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), like the plaintiffs here, argued that survivors may recover for nonpecuniary losses resulting from wrongful death on the high seas. This Court rejected that argument, holding that, on the high seas, the remedy provided by DOHSA is exclusive. That decision, properly understood, disposes of this case as well.

At bottom, the issue in this case is indistinguishable from the one decided in *Higginbotham:* whether federal courts, in the exercise of their power to fashion rules of decision in admiralty, may supply a more generous remedy for wrongful death on the high seas than that

prescribed by DOHSA. In *Higginbotham*, the lower court had supplied a more generous remedy by applying a rule of federal common law; here, the same lower court did so by applying a rule borrowed from state law. But that distinction has no analytical significance in this context. This Court's decision in *Higginbotham* did not turn on whether the lower court had looked to the wrong body of law in fashioning a supplemental remedy; it turned on whether admiralty courts are empowered to fashion a supplemental remedy at all. This Court already had determined in *Moragne* that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." 398 U.S. at 401 n.15. If supplementation of DOHSA were necessary and appropriate, the Court naturally would have approved the use of general maritime law for that purpose.

Instead, in sweeping language, the Court held that admiralty courts may not supply a more generous remedy for wrongful death on the high seas than that prescribed by DOHSA:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. . . . The Act does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

436 U.S. at 625. In particular, the Court instructed that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supplements." *Id.*

The court below sought to brush *Higginbotham* aside with the observation that it "dealt solely with whether damages available under DOHSA could be supplemented by the general maritime wrongful death remedy recognized in *Moragne* . . . . Whether DOHSA preempts state wrongful death remedies was not addressed in the decision." Pet. App. 14a-15a. But the court's effort to distinguish *Higginbotham* on that ground simply reflects a failure to appreciate the limited and subordinate role of state law in admiralty—a failure to recognize that state tort law operates in admiralty not of its own force but only by federal permission. When an admiralty court adopts and applies state tort law, it is exercising precisely the same judicial power as when it fashions and applies a general maritime rule: it is exercising the power of a common law court to choose or devise a rule of decision when the legislature has not yet done so. The teaching of *Higginbotham*, as this Court explained in *Milwaukee v. Illinois*, 451 U.S. at 315, is that an admiralty court's freedom to exercise that power is checked by the enactment of a comprehensive federal statute prescribing a legislative rule of decision. This means, more particularly, that DOHSA precludes admiralty courts from providing supplemental remedies for wrongful death on the high seas, whether through the application of general maritime rules or the adoption of state law.

It is clear, moreover, that such a general preclusion is precisely what the Court had in mind, and that the Court specifically understood that it was forbidding the application of state wrongful death statutes on the high seas. The only cases the Court cited for the proposition that DOHSA does not allow "the creation of non-pecuniary supplements" were "*Barbe v. Drummond*, 507 F.2d 794, 801 n.10 (CA 1 1974); *Wilson v. Transocean Airlines*, 121 F. Supp. 85 (ND Cal. 1954)." 436 U.S. at 625. The footnote cited from the opinion in *Barbe v. Drummond* expressly rejects the view that DOHSA "allow[s] a state wrongful death statute to operate where the death

occurs on the high seas." And *Wilson v. Transocean Airlines* is the landmark case establishing the rule that state law will not be adopted and applied in admiralty in order to supplement DOHSA on the high seas. This Court's citation of those two decisions with approval confirms that the Court intended to foreclose all supplementation of DOHSA, and specifically the borrowing of remedies from state law.

This conclusion is further confirmed by the Court's observation that the only maritime nonuniformity with respect to wrongful death that would persist following *Higginbotham* was "the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." 436 U.S. at 624 n.18. To permit DOHSA to be enlarged or supplemented by the various and conflicting laws of the separate states obviously would run directly counter to that observation.

In short, the plain meaning of *Higginbotham*, as the Ninth Circuit correctly recognized in *Nygaard v. Peter Pan Seafoods*, is that DOHSA establishes the exclusive remedy (apart from the Jones Act) for wrongful death on the high seas. Like the Jones Act, DOHSA is a federal statute "of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Lindgren*, 281 U.S. at 44.

C. Nothing In The Text Or Legislative History Of DOHSA Requires Admiralty Courts To Borrow From State Law

The court of appeals rejected this interpretation of *Higginbotham* because it believed that enforcement of state law on the high seas is compelled by "the clear mandate of section 7 of DOHSA." Pet. App. 2a. The court simply misread the statute. Section 7 "is a mere saving clause, and does not give the [state] statutes any effect that they did not have regardless of it." Hughes,

Death Actions in Admiralty, 31 Yale L. J. 115, 123 (1921).[4] Section 7 provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. § 767. By stating that the "provisions" of state law are not "affected," section 7 means, at the very most, only that DOHSA does not interfere with the operation of state law in those circumstances where state law otherwise operates of its own force. Because state tort law does not operate of its own force in admiralty, section 7 has no direct bearing on this case.

Even apart from its literal inapplicability, section 7 was not intended to affect the disposition of cases such as this. Section 7 was "put in out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law." 59 Cong. Rec. 4483 (Mar. 17, 1920) (Rep. Montague).[5] The purpose of section 7 was to ensure that admiralty courts could continue to borrow from state law where Congress and the general maritime law had left a void. Thus, in territorial waters, admiralty courts could continue to "accommodate[] the humane policies of state wrongful-death statutes by allowing recovery whenever an applicable state statute favored such recovery." *Moragne*, 398 U.S. at 393. But section 7 did not and does not mean that state law also must be incorporated into admiralty law for the high seas. Section 7 does not, in other words, command admiralty courts to borrow from state law in adjudicating cases of wrongful death on the high seas.

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[4] The author of that article, Robert M. Hughes, was "in touch with the efforts to secure this legislation from their inception, having been a member of committees both of the Maritime Law Association and of the American Bar Association, . . . [and thus] had exceptional advantages for knowing the lines along which this statute has been evolved. In fact, in its final form much of it was drawn by him." Hughes, *supra*, Yale L. J. at 116.

[5] Representative Montague was the sponsor of the bill in the House of Representatives. H.R. 5282, 66th Cong., 1st Sess. (1919).

Nor did Congress intend to issue such a command. The very purpose of DOHSA was to eliminate the perceived need to borrow from state law in adjudicating such cases. Its enactment was prompted by widespread dissatisfaction with the application of state wrongful death statutes on the high seas. *See Wilson v. Transocean Airlines*, 121 F. Supp. at 88. The legislative effort that culminated in the passage of DOHSA in 1920 had begun as early as 1900. *Id.* at 88-89 and n.8. The earliest legislative proposals provided "a uniform and exclusive federal right of action for all navigable waters." *Id.* at 89. Only after years of negotiation was a compromise reached pursuant to which an exclusive federal remedy would be established for the high seas but state remedies would be preserved for territorial waters. *See* Hughes, *supra*, 31 Yale L. J. at 117-18.

This background and also the explicit congressional purpose in enacting DOHSA are set forth in the reports of the Senate and House Judiciary Committees:

> State statutes . . . are far from uniform. In some States the recovery is limited to the conscious suffering before death—a matter difficult of proof in case of drowning at sea. . . . Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. In a few States the remedy for damages must follow or be concurrent with a criminal prosecution, so that the offender must have been first indicted. Furthermore, corporations owning seagoing vessels are not confined to the States upon the seaboard. For reasons of taxation or other supposed advantages shipping corporations may be organized in a remote inland State, and if the vessels are negligently managed at sea the death remedy must be sought in the statutes of such State. If a collision be supposed between vessels of different States, having diverse systems of relief for death, obviously great difficulties would arise, especially in fixing damages.

Although the constitutional grant of all cases of admiralty and maritime jurisdiction, with the power to regulate commerce, was intended to secure uniformity throughout the country, the Supreme Court has suffered this anomalous condition to grow up on the permissive theory that until Congress acts a State can legislate at least to the extent of binding corporations which it has created, so that these statutes may extend to torts committed more than 3 miles from land.

Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone can enact.

The present bill is designed to remedy this situation by giving a right of action for death, to be enforced in the courts of admiralty, both in rem and in personam. *The right is made exclusive for deaths on the high seas*, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.

S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919) (emphasis supplied); H. R. Rep. No. 674, 66th Cong., 2d Sess. 3 (1920) (emphasis supplied). Each Committee's report, moreover, stated explicitly that "so far as the high seas are concerned, . . . the remedy [is] exclusive. This is for the purpose of uniformity, as the States cannot properly legislate for the high seas." S. Rep. No. 216 at 3; H. R. Rep. No. 674 at 4.

It would defeat the expressly stated legislative purposes of exclusivity and uniformity to enforce state wrongful death statutes on the high seas. The court below, however, believed that these purposes were abandoned when the House of Representatives adopted a last-minute amendment offered by Representative Mann of Illinois. But that reading of the legislative history distorts the meaning and exaggerates the importance of a single brief episode on the floor of the House.

Section 1 of DOHSA restricts the application of the statute to deaths "occurring on the high seas beyond a marine league from the shore of any State." 46 U.S.C. § 761. As passed by the Senate and reported by the House Judiciary Committee, the first sentence of section 7 had provided that "the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State." 59 Cong. Rec. 4482 (Mar. 17, 1920). On the House floor, Representative Mann offered an amendment striking from the first sentence of section 7 the concluding phrase "as to causes of action accruing within the territorial limits of any State." *Id.* at 4484.

The brief debate over the Mann amendment was marked by confusion. Representative Mann admitted that he had "not examined the report of this bill carefully." 59 Cong. Rec. 4484. But he apparently was concerned that if the reference in section 7 to the "territorial limits of any State" were to be read as the mirror image of the phrase "beyond a marine league from the shore of any State" in section 1, the result might be to deny application of state law to waters beyond one marine league from shore even when those waters in fact were within the legal boundaries of a state:

> For instance, the territory of the State of Illinois runs out into the middle of Lake Michigan, or close to it, and the territories of Michigan and Illinois join in Lake Michigan. . . . It was not the intent nor the desire in any way to interfere with the jurisdiction of those States over things that happen on the lake, because they happen within the limits of the State, although it is considerably more than 3 miles from the shore.

Id. at 4483 (Rep. Mann).

In fact, there was no cause for concern on that score. The second sentence of section 7 made explicit that the

Act would not apply to the Great Lakes. 59 Cong. Rec. 4482. When this was called to his attention, Representative Mann replied, "I know. That is a specific provision, but the same situation might arise in other States. Though I do not know, I suppose if a man is injured *on the high seas within a State* and he can get service on the defendant, as a result of that injury, he can bring suit." *Id.* at 4483 (emphasis supplied). It is not clear what Representative Mann meant by the phrase "high seas within a State." He may have had in mind either territorial waters more than three miles from shore—such as the interiors of large inland lakes, like the Great Salt Lake, or of juridical and historic bays, *see, e.g., United States v. California*, 381 U.S. 139, 169-75 (1965) —or, more generally, all navigable territorial waters whether or not more than three miles from shore. *See United States v. Rodgers*, 150 U.S. 249, 254-59 (1893). But he presumably was not using the phrase "within a state" to refer to waters actually beyond a state's legal boundary.

In his most elaborate explanation of his amendment, which apparently was not prepared in advance of its presentation on the floor, Representative Mann combined his concern about an unduly narrow construction of the phrase "territorial limits" with a desire to preserve the right to proceed in state court:

> I was under the impression that *the bill was not intended to take away any jurisdiction which can now be exercised by any State court* . . . .
>
> If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the "territorial limits" of the State or not. *In other words*, if a man had [a] cause of action and could get service, *he could sue in a State court and not be required to bring suit in the Federal court.*

59 Cong. Rec. 4484 (quotation marks and emphasis supplied). This statement by Representative Mann, read in isolation, is ambiguous and confused. But when the statement is juxtaposed against his earlier statements on a prior version of the bill, it becomes clear that Representative Mann did not intend to require enforcement of state law on the true high seas.

At the time similar legislation had been proposed in a preceding Congress, Representative Mann had acknowledged that admiralty courts have "jurisdiction of accidents upon the high seas, *where no State has jurisdiction*," and that "[i]f an accident occurs on the high seas, you can not bring a suit anywhere else than in the admiralty court." 51 Cong. Rec. 1928 (Jan. 19, 1914) (emphasis supplied). Thus, Representative Mann believed that a state court had jurisdiction only over suits for wrongful death occurring within the state's legal boundaries. In 1920, Representative Mann was merely seeking to preserve that existing state court jurisdiction. His purpose in proposing deletion of the phrase "territorial limits" from section 7 was simply to avoid the possibility that that phrase might be construed as designating a rigid three-mile line rather than as referring to a state's actual legal boundary.

If Representative Mann had something else in mind, he failed to make his intention explicit. But one thing is certain. If, as the court below believed, Representative Mann intended to require admiralty courts to enforce state law on the true high seas, there is no reason to believe that that intention was fully understood, let alone generally shared, by the other members of the House. Indeed, as the court below conceded, "an attempt to discern the congressional intent from the conflicting statements by participants in the debate is hopeless." Pet. App. 13a.

Only a few members were on the floor of the House at the time the Mann amendment was offered and de-

bated. No one spoke in favor of the amendment other than Representative Mann. Representatives Dewalt and Reed indicated their understanding that the amendment was addressed solely to the preservation of the right to a jury trial in state court. *See* 59 Cong. Rec. 4484-85. Three other members of the House expressed the conviction that adoption of the amendment would have no legal consequences with respect to the high seas because, as a constitutional matter, the uniform federal remedy established by section 1 would be exclusive wherever it applied. Thus, Representative Igoe informed Representative Mann that a suit could not be maintained pursuant to state law "under your amendment if the . . . death occurred on the high seas. . . . If we pass a law for admiralty jurisdiction in the United States, it is exclusive." 59 Cong. Rec. 4484. Representative Goodykoontz stated, more generally, that "[i]f the amendment prevails, my judgment is that the State courts and their decisions will be superseded by the exclusive power and authority of the admiralty courts . . . ." *Id.* at 4486. *See also id.* at 4485 (Rep. Volstead) ("whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject"). *See generally Wilson v. Transocean Airlines*, 121 F. Supp. at 90.

The Mann amendment initially was defeated, 12 votes to 10. 59 Cong. Rec. 4486. It then was passed on a roll call vote, without any further explanation of its content or purpose being given to those members who had not been on the floor earlier. There is no suggestion in the debate or the votes taken that the House as a whole intended, by its adoption of the Mann amendment, to upset the compromise that had been achieved after years of legislative effort and to defeat the stated purpose of establishing a uniform and exclusive federal remedy for death on the high seas. To the contrary, the equivocal history of Representative Mann's amendment justifies

the conclusion, reached more than thirty years ago in *Wilson v. Transocean Airlines*, 121 F. Supp. at 90, that "the approval of the amendment represented no more than the acceptance of what appeared to be an innocuous change in language to facilitate the immediate passage of the legislation."

In summary, the literal text of section 7 does not require admiralty courts to borrow from state law in order to supplement or enlarge the uniform federal remedy prescribed by DOHSA, and the history of that provision does not require that it be construed non-literally in a manner that would defeat the underlying legislative objectives of uniformity and exclusivity. "[S]ince the Death on the High Seas Act was drawn with the purpose to afford an exclusive, uniform federal right of action for death on the high seas, the right of action which it created is not appropriate to serve as a mere supplement to state-created rights of action on the high seas." *Wilson v. Transocean Airlines*, 121 F. Supp. at 90. This Court in *Higginbotham* therefore was correct in "treating [DOHSA's] statutory remedies for wrongful deaths on the high seas as exclusive." *American Export Lines v. Alvez*, 446 U.S. 274, 282 (1980) (plurality opinion).

D. Borrowing From State Law Would Make A Mockery Of The Constitutional Policy Of Maritime Uniformity

This conclusion is supported and confirmed by the constitutional policy of maritime uniformity—a policy deeply embedded in admiralty jurisprudence. *See, e.g., The Roanoke*, 189 U.S. 185, 197-99 (1903); *The Lottawanna*, 88 U.S. (21 Wall.) at 575. This constitutional policy received perhaps its fullest elaboration in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), where the Court refused to give effect to state law

> if it [1] contravenes the essential purpose expressed by an act of Congress or [2] works material preju-

> dice to the characteristic features of the general maritime law or [3] interferes with the proper harmony and uniformity of that law in its international and interstate relations.

See also Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 161 (1920). Although the immediate result in *Jensen*—refusal to apply state workmen's compensation statutes to accidents occurring in territorial waters—has been much criticized, "the principles which [that opinion] espoused have never been abandoned." Currie, *supra*, 1960 Sup. Ct. Rev. at 167. Those principles have structured and informed the judicial evolution of admiralty law.

To be sure, the Court in *Jensen*, citing *The Hamilton*, indicated that state legislation could provide "the right . . . to recover in death cases." 244 U.S. at 216. But *Jensen* was decided before the enactment of DOHSA. "The enactment of DOHSA in 1920 . . . rendered obsolete the Supreme Court's suggestion in *The Hamilton* that state wrongful death statutes could be applied to deaths on the high seas." Gilmore & Black, *The Law of Admiralty* 364 (2d ed. 1975) (footnote omitted). Adoption and application of state wrongful death statutes on the high seas today would, as has already been shown, contravene DOHSA's essential purposes of uniformity and exclusivity. It also would materially prejudice the characteristic features and interfere with the proper harmony and uniformity of maritime law. Following the enactment of DOHSA, the constitutional policy of maritime uniformity militates strongly against the borrowing of state law.

1. *Enforcement Of State Tort Law On The High Seas Would Work Material Prejudice To The Characteristic Features Of Maritime Law*

In *The Tungus v. Skovgaard*, 358 U.S. 588, 592 (1959), this Court held that "when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached." This suggests that enforcement of state wrongful death statutes on the high seas would entail the wholesale adoption of state tort law. *See id.* at 593 ("It is incumbent upon a court enforcing [the state's] policy to enforce it all; it may not pick or choose"). This apparently is what the court below had in mind. *See, e.g.*, Pet. App. 23a ("Louisiana will apply its tort law to an event or a transaction occurring [on the high seas]").

Decisions of this Court subsequent to *The Tungus* cast doubt upon whether enforcement of a state wrongful death statute in admiralty requires adoption of the state duty of care as well. *See, e.g., Hess*, 361 U.S. at 321-22 (separate statement of Warren, C.J.). In *Moragne*, moreover, the Court proceeded from the assumption that the only relevant substantive duties of care, even in territorial waters, are those imposed by the general maritime law. *See* 398 U.S. at 399-401. Thus, it is an open question whether adoption of state wrongful death statutes as a supplement to DOHSA would require extension of state duties of care onto the high seas. But there can be little doubt that such an extension would in fact work material prejudice to the characteristic features of maritime law.

In addition, whether or not state duties would be enforced on the high seas, other aspects of state tort law surely would be. For reasons stated in *The Tungus*, enforcement of state wrongful death statutes on the high seas would require admiralty courts to adopt (1) state rules governing the measure of damages, (2) defenses recognized under state law, (3) state-established classes of beneficiaries, and (4) state statutes of limitations. In all those ways, admiralty law would come to deviate from DOHSA, which has set the standard for and established the characteristic features of maritime law for the last 65 years.

a. *State duties of care differ significantly from those imposed by the general maritime law*

The general maritime law and all state tort laws recognize negligence as a basis of liability. But from that point, the various regimes of law part company in numerous ways. Whereas maritime law is understood to allow recovery for strict product liability and for breach of warranty, *see, e.g., Pavlides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984); *Fosen v. United Technologies Corp.*, 484 F. Supp, 490, 496 (S.D.N.Y.), *aff'd mem.*, 633 F.2d 203 (2d Cir. 1980), at least some states do not, *see, e.g., Higginbotham v. Ford Motor Co.*, 540 F.2d 762 (5th Cir. 1976). Louisiana, for example, denies strict product liability claims against commercial sellers. *Hudgens v. Interstate Battery Systems of America, Inc.*, 393 So. 2d 940 (La. Ct. App. 1981).

Some state statutes apply stricter standards of care than does the maritime law. *See Hess*, 361 U.S. at 315-17. On the other hand, the doctrine of unseaworthiness—the strict duty to provide a fit ship and crew—as a practical matter is unique to maritime law. *See* 1 Speiser, *Recovery for Wrongful Death 2d* § 2:12 (1975 and 1985 Supp.).

It therefore is apparent that the attempt to apply state duties of care on the high seas would involve the courts once again in the difficulties encountered in *The Tungus*, *Hess*, and *Goett v. Union Carbide Corp.*, 361 U.S. 340 (1960). Application of state law would lead in some cases to denial of recovery where there had been a breach of a maritime duty (*The Tungus*), but in other cases to the award of damages where no maritime tort had been committed (*Hess*). These are peculiar outcomes for cases adjudicated in admiralty. Moreover, the application of state tort doctrine to maritime occurrences is fraught with difficulty and uncertainty (*Goett*).

This Court in *Moragne* recognized a federal cause of action for wrongful death in large part in order to "remov[e] the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." 398 U.S. at 401. Now to recognize and enforce state substantive duties of care on the high seas would be a major step backwards.

b. *State rules of recovery for wrongful death differ significantly from those imposed by DOHSA*

"DOHSA brought a measure of uniformity and predictability to the . . . high seas." *Higginbotham*, 436 U.S. at 621. To supplement DOHSA with conflicting systems of state rules would replace order with chaos. In the days before *Moragne*, such legal chaos was a necessary evil in territorial waters, for at least it filled the void left by the absence of a general martime right of recovery. But the distortion of maritime law resulting from the application of state law to the high seas, where uniform federal rules of recovery have long been in place, cannot be similarly justified.

The differences between DOHSA and state law are many and various. (1) *Measure of damages.* DOHSA allows recovery only for pecuniary loss. 46 U.S.C. § 762. State laws differ widely from DOHSA and from one another. Those states that measure damages by reference not to the survivors but to the estate of the deceased generally deny recovery for nonpecuniary loss. 1 Speiser, *supra*, at § 3:68. On the other hand, most states that measure damages by reference to the survivors allow recovery for loss of society, although some do not. *See Gaudet*, 414 U.S. at 587 n.21. Of those states that do allow such a recovery, some impose a maximum limit on recovery while others do not. *See generally* 1 Speiser, *supra*, at §§ 7:1 and 7:2. In addition, a few states allow recovery for mental anguish, *id.* at §§ 3:52 and 3:53, and

other states permit awards of punitive damages. *Id.* at 3:4. One state, oddly, allows recovery *only* of punitive damages. *See Merrell v. Alabama Power Co.*, 382 So. 2d 494 (Ala. 1980).

(2) *Defenses.* DOHSA adopts the doctrine of comparative negligence. 46 U.S.C. § 766. *See United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 408 n.13 (1975). Most states, on the other hand, adhere to the doctrine of contributory negligence. "The general rule in wrongful death cases is that decedent's negligence, proximately contributing to the fatal injury, bars recovery on behalf of his survivors." 1 Speiser, *supra*, at § 5:1, p. 575. Recovery for wrongful death under maritime law, including DOSHA, is not barred by the decedent's prior recovery for personal injury. *Gaudet*, 414 U.S. at 583 and n.10. State law generally is to the contrary. *Id.* at 579. *See also* Annot., *Judgment in Favor of, or Adverse to, a Person Injured as Barring Action for His Death*, 26 A.L.R.4th 1264 (1983). In addition, the states have reached varying results on such questions as the effect of releases executed by the decedent prior to death, *see* Annot., *Validity of Release of Prospective Right to Wrongful Death Action*, 92 A.L.R.3d 1224 (1979), the scope of intrafamilial immunity, *see* 1 Speiser, *supra*, at §§ 5:24 and 5:25, and whether the quality of the relationship between the beneficiary and the deceased is a basis for mitigation of damages. *Id.* at §§ 6:1 through 6:4. Admiralty courts apparently have not heretofore had occasion to address these questions under DOHSA.

(3) *Designated beneficiaries.* DOHSA provides an action "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative . . . ." 46 U.S.C. § 761. State laws disagree with DOHSA and with each other in several respects. There are in general three types of statutes. *First*, "[m]any wrongful death statutes set up separate classes of beneficiaries based on their

relationship to the deceased. These classes are exclusive—that is, the right of action inures to the benefit of the first preferred class, if any beneficiaries belonging to that class are alive. If there are no beneficiaries in that class, the right of action passes to the class next in line of preference." 2 Speiser, *supra*, at § 10:1, p. 125. Louisiana follows this approach. *See* La. Civ. Code Ann. 2315(D)(1). *Second*, "[s]ome states have statutes [like DOHSA] which do not classify beneficiaries but merely designate certain persons for whose benefit the action is to be brought." 2 Speiser, *supra*, at § 10:1, p. 126. *Third*, some states follow the decedent's will or the law of intestacy. *Id.* Within each of these three general categories, different states identify different beneficiaries or classes of beneficiaries. *See id.*

(4) *Statutes of limitations.* As amended in 1980, DOHSA provides a three-year period of limitation. 46 U.S.C. § 763a. The purpose of the amendment was "to establish a uniform national standard of limitations for maritime torts." H. R. Rep. No. 737, 96th Cong., 2d Sess. 1 (1980). This purpose would be frustrated by permitting an overlay of state law, which adopts periods of limitation varying from as little as one year to as much as six years. *See* 2 Speiser, *supra*, at § 11:8. Moreover, the period of limitation under DOHSA apparently runs from the date of death, *see id.* at § 11:13, whereas in some states the period runs from the date of injury. *See id.* at §§ 11:9 through 11:17.

2. *Enforcement Of State Tort Law On The High Seas Would Interfere With The Proper Harmony And Uniformity Of Admiralty Law*

As the preceding discussion illustrates, if state tort law were to be enforced on the high seas, nonuniformity would become the order of the day. Duties, measures of damages, defenses, beneficiaries, and periods of limitation would shift in kaleidoscopic fashion from case to case—

all within the context of a system of admiralty law for the high seas that was intended by the Framers to be "operating uniformly in, the whole country." *The Lottawanna*, 88 U.S. (21 Wall.) at 575. In *Higginbotham*, this Court instructed that "[i]n the area covered by [DOHSA], it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." 436 U.S. at 625. The court below multiplied the impropriety by prescribing different rules for all aspects of recovery.

If state duties of care were to be enforced on the high seas, presumably it would be pursuant to and limited by the notion that each state may control the extraterritorial activities of its own citizens and residents. *See* Pet. App. 22a. This would mean that persons from different states would carry with them onto the high seas different duties of care and also different potential defenses. Remedies for wrongful death would vary according to the residence not of the decedent or survivors but of the tortfeasor—a factor that, from the perspective of survivors, would in most instances turn upon no more than mere happenstance. Recovery in excess of that allowed by DOHSA, or by survivors other than those named in DOHSA, would resemble success in a lottery; it would not be the natural consequence of a rational program of compensation for maritime death. (Moreover, enforcement of state duties on the high seas carries with it an obvious potential for confusion when joint tortfeasors hail from different states.)

There would, however, be something distinctly odd about enforcing state tort duties on the high seas in that manner. To the extent that a state can be said to have any legitimate interest at all in the subject of wrongful death on the high seas, its principal interest presumably is not in imposing duties upon its citizens and residents but rather in affording them compensation for injuries

caused by others. *See* Pet. App. 23a. Perhaps for that reason it may have been superficially attractive to the court below to think in terms of extending only state remedies, and not state duties, to the high seas. But that is hardly a solution to the problem of nonuniformity. If anything, it would magnify the problem.

There is no developed set of principles for determining which state's remedial laws should be adopted in admiralty for the adjudication of a claim for wrongful death arising from an accident on the high seas. Once remedy is divorced from duty—once state remedies are adopted for the breach of a purely federal maritime duty—the choice of remedial law for the high seas becomes almost completely arbitrary. If admiralty were to apply the law of the state where the tortfeasor resides or is incorporated, at least commercial operators and their insurers would have some general guidance with respect to the scope of potential liability. But this would leave survivors subject to the caprice of fortune. Their recoveries, administered in admiralty, would be determined not by maritime law or the will of Congress but by the policies of the tortfeasor's state—a state with which they may have no connection and that may have no interest in them or their welfare.

On the other hand, if admiralty were to adopt the rules of recovery prescribed by the state in which the survivor resides, commercial operations on the high seas would be confronted by an apparently random patchwork of unpredictable rules. Operators and insurers of foreign vessels no longer could rely upon any established American rule; nor could operators and insurers of domestic vessels anticipate the law that would be applied in the event of mishap. Every operator and insurer would have to take into account, for example, the possibility of punitive damages, even though such damages are not available under DOHSA or the laws of many states. To adopt the remedial law of the survivor's state, moreover, would

mean that admiralty would provide different remedies even for wrongful deaths resulting from the same accident. In this case, it should mean that the plaintiff in *Taylor* would recover under the law of Louisiana and the plaintiff in *Tallentire* under the law of Pennsylvania. *See* Pet. App. 6a n.6.

The court below avoided that anomalous result by treating both cases as controlled entirely by Louisiana law, because "[b]oth plaintiffs were also Louisiana residents at the time of the crash." Pet. App. 23a. But accidents on the high seas, more typically, are multi-state or multi-national in their contacts. Even the choice of which nation's law should apply may be difficult in some cases. *See Hellenic Lines v. Rhoditis*, 398 U.S. 306, 308-09 (1970); *Lauritzen v. Larsen*, 345 U.S. 571, 583-91 (1953). If a further choice had to be made among conflicting state laws to determine which should be adopted to supplement DOHSA, the matter could become intricately complicated. There is no established rule or intuitively correct procedure for determining which state's wrongful death statute should govern a situation, for example, where decedents resided in states A, B, and C, joint tortfeasors resided in states C and D, survivors resided in states A, B, and E, and the accident occurred nearest the territorial waters of state F (or distantly remote from the territorial waters of any state). *See generally*, Currie, *The Choice Among State Laws in Maritime Death Cases*, 21 Vand. L. Rev. 297 (1968).

Such complex situations, which are not at all uncommon when tragedy strikes in international waters, demonstrate more than just the difficulty that may be encountered in developing a fair, coherent, and rational body of principles for choosing among state statutes on the high seas. They suggest the relatively attenuated nature of any given state's interest in being law-giver for the seas; in such situations no one state has a compellingly superior interest in the outcome. This, in turn, indicates the wisdom of providing for and adhering to a uniform body of national law that generates consistent and predictable results.

The rule adopted by the court below would cause nonuniformity not only from state to state, from tortfeasor to tortfeasor, from decedent to decedent, and from survivor to survivor. It also would enormously widen the disparity between territorial waters and the high seas—a disparity that this Court in *Higginbotham* described as constituting merely the application of "one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." 436 U.S. at 624 n.18.

Following *Moragne*, the Fifth and Ninth Circuits—the only courts of appeals to have considered the question—have concluded that admiralty no longer will apply state law when death occurs in territorial waters. *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976); *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980). These decisions conform to this Court's teaching that, where the Constitution has allocated jurisdiction to the federal government, implementation of federal common law means that "state law cannot be used." *Milwaukee v. Illinois*, 451 U.S. at 313 n.7. Under the decision below, therefore, there would be one national rule for territorial waters but an unpredictable overlay of conflicting state rules on the high seas—"a result as damaging to uniformity in wrongful death actions as it is illogical." *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d at 80. Even the court below acknowledged that "the anomaly of allowing state statutes to operate on the high seas but not in territorial waters is apparent," Pet. App. 15a, and that "[i]t is indeed profoundly unsettling that state law will have nothing to do with a claim for wrongful death which occurs on the Mississippi River, yet might apply to the death of an offshore worker forty miles from land . . . ." Pet App. 18a.

The Fifth Circuit unquestionably was correct in recognizing that its extension of a hodgepodge of various and conflicting state remedies onto the high seas "does not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades." Pet. App. 17a. But the court gave insufficient attention to the fact that the uniformity this Court has nurtured is a matter of constitutional policy. *See, e.g., Moragne*, 398 U.S. at 402. As a matter of constitutional policy, as well as common sense, state wrongful death statutes should not be "allowed to interfere with the uniformity which has been declared a dominant requirement for admiralty law." *Flink v. Paladini*, 279 U.S. 59, 63 (1929).

On the high seas, especially, there is little excuse for maritime nonuniformity. As the reports of the Senate and House Judiciary Committees noted in recommending passage of DOHSA, "the States cannot properly legislate for the high seas." S. Rep. No. 216 at 3; H. R. Rep. No. 674 at 4. Nor are admiralty courts required to give substantial weight to state interests in fashioning federal rules of governance for the high seas. "[O]utside the boundary of any State, . . . no State has a sufficient interest [to disturb the uniformity of a federal statutory regime]." *Oil, Chemical & Atomic Workers v. Mobil Oil Corp.*, 426 U.S. 407, 420-21 (1976). It is neither necessary nor appropriate, on the high seas, to sanction "patently anomalous extraterritorial applications" of state wrongful death statutes. *Id.* at 418. Once Congress has prescribed a uniform national rule for the high seas, as it did in DOHSA, there is no further occasion to look to state law.

To adopt and enforce state wrongful death statutes on the high seas would regenerate the jurisprudential confusion apparently dissipated by *Moragne*. State law typically does not embrace maritime concepts, *see Moragne*, 398 U.S. at 401 n.15, and the application of state law to maritime occurrences is difficult and problematical. *See Goett*, 361 U.S. at 342-44. The Court once more would be plunged into the debate over the proper application of state remedies when state and federal duties differ in significant respects. *See* Gilmore & Black, *The Law of Admiralty* at 365-67. Even when that debate centered upon the territorial waters, where Congress had afforded no relief and admiralty courts were guided in part by "a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders," *Just v. Chambers*, 312 U.S. 383, 391 (1941), the Court eventually concluded that the answer lay in fashioning a uniform federal rule. *Moragne*, 398 U.S. at 401-02. Here, "Congress has struck the balance for us," *Higginbotham*, 436 U.S. at 623, and there is no place for special solicitude for states' sovereignty over matters outside their territorial jurisdiction and over which they long have been viewed as having no say. A uniform federal rule for the high seas already exists, and there is no need or reason for admiralty courts to depart from it.

CONCLUSION

The judgment below should be reversed insofar as it permits enforcement of state wrongful death statutes on the high seas.

Respectfully submitted,

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

RESPONDENT'S

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In The
Supreme Court of the United States
October Term, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

CHARLES HANEMANN*
HENDERSON, HANEMANN & MORRIS
300 Lafayette Street
Houma, Louisiana 70360
(504) 868-2081
Attorneys for Respondent Corine Ann Soudelier Taylor

V. FARLEY SONNIER*
DAVIDSON, MEAUX, SONNIER & McELLIGOTT
810 South Buchanan Street
Lafayette, Louisiana 70502
(318) 237-1660
Attorneys for Respondent Beth A. Tallentire

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTION PRESENTED

May the courts subvert Section 7 of the Death on the High Seas Act, 46 U.S.C.A. §§ 761, 767, to deprive survivors of full compensation for deaths on the high seas, under the guise of fostering maritime uniformity?

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No. 85-202

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In The

Supreme Court of the United States

October Term, 1985

—o—

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

—o—

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent.

—o—

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

BRIEF FOR RESPONDENTS

—o—

STATEMENT OF THE CASE

James Tallentire lived with his wife in Louisiana. He was employed by Gator Hawk, Inc., in Louisiana. Michael Taylor lived with his wife and ten-year-old daughter in Louisiana. He was employed by Halliburton Services in Louisiana. Both Tallentire and Taylor worked on fixed platforms in the Gulf of Mexico off the coast of Louisiana.

On August 6, 1980, Tallentire and Taylor were passengers in a helicopter owned and operated by Air Logistics, a division of Offshore Logistics, Inc., a Louisiana corporation. The helicopter was based in Louisiana. While trans-

porting them from the platform to Houma, Louisiana, the helicopter crashed into the Gulf, more than three miles from Louisiana's coast. Tallentire, Taylor, and all others on board died.

The widows, the respondents in this Court, sued in federal courts for pecuniary loss under the Death on the High Seas Act (DOHSA), 46 U.S.C.A. §§ 761, 762, and for both pecuniary and non-pecuniary loss under Louisiana's wrongful death act, Article 2315 of the Louisiana Civil Code. (Pet.App. 73a-76a) The defendant, the petitioner in this Court, admitted liability. The district court struck the claims under state law, denied non-pecuniary loss, and awarded only pecuniary loss under DOHSA.

The respondents appealed, pressing for application of Louisiana's death act on the high seas. The Fifth Circuit rejected the respondents' argument that the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333, adopted Louisiana law as the surrogate federal law applicable to this accident. But the Fifth Circuit agreed that Louisiana's death act applied outside of Louisiana, and that Section 7 of DOHSA explicitly permits it to apply on the high seas. The Fifth Circuit vacated the district court's judgment and remanded with instructions to consider the respondents' claims under Louisiana law for non-pecuniary loss.

This Court granted certiorari.

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SUMMARY OF ARGUMENT

1. The United States Constitution grants to federal courts jurisdiction over maritime cases. U.S. Const. art. III, § 2. But this grant is not exclusive; state courts retain a "wide scope" of jurisdiction over maritime cases.

Romero v. International Terminal Operating Co., 358 U.S. 354, 373 (1959); 28 U.S.C.A. § 1333; *The Federalist Nos. 32 & 82* (A. Hamilton). State legislatures also retain legislative authority to adopt and regulate state remedies which apply in maritime cases. *Madruga v. Superior Court*, 346 U.S. 556 (1953). One remedy created by state law which may apply in a maritime locale like the high seas is a state's wrongful death act. *The Hamilton*, 207 U.S. 398 (1907); *The E. B. Ward, Jr.*, 17 Fed. 456 (C.C. La. 1883).

2. Louisiana's wrongful death act, Article 2315 of the Civil Code, does apply outside Louisiana's boundaries, *Romero v. State Farm Mut. Auto. Ins. Co.*, 277 So.2d 649 (La. 1973), even on the high seas. *The E. B. Ward, Jr., supra.*

3. Before 1920, wrongful death on the high seas gave rise to no remedy under federal maritime law. *The Harrisburg*, 119 U.S. 199 (1886). Only states' death acts gave rise to a remedy for wrongful death on the high seas. *The Hamilton, supra.* In 1920, Congress enacted DOHSA, 46 U.S.C.A. §§ 761 et seq., to create a federal remedy for wrongful death on the high seas. In the process, Congress preserved the remedy under states' death acts for wrongful death on the high seas. "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter . . . . " 46 U.S.C.A. § 767. Congress thus selectively borrowed state death acts, Hart & Wechsler, *The Federal Courts and the Federal System* 817-21 (2d ed. 1973), for application on the high seas concurrently with DOHSA.

As originally offered, the bill which became DOHSA would have saved states' death acts only "as to causes of action accruing within the territorial limits of any state." 59 Cong.Rec. 4482 (Mar. 17, 1920). Congress amended

out the quoted language, demonstrating its intent that states' death acts remain in force not only "within the territorial waters of any state," but also on the high seas.

The more modern and better reasoned decisions of the inferior courts, *e.g., Rairigh v. Erlbeck,* 488 F.Supp. 865 (D. Md. 1980), and the American Law Institute's *Study of the Division of Jurisdiction Between State and Federal Courts* 237 (1969), favor concurrent application of DOHSA and states' death acts on the high seas under Section 7 of DOHSA.

This Court's decision in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978), does not suppress states' death acts on the high seas. *Higginbotham* dealt solely with whether damages available under DOHSA could be supplemented by damages under the general maritime law, as announced in *Moragne v. States Marine Lines,* 398 U.S. 375 (1970). The Court did not consider in *Higginbotham* whether states' death acts may apply on the high seas.

4. Our federal system permits state remedies to apply concurrently with federal remedies, unless the state remedies are "absolutely and totally *contradictory* and *repugnant*" to the federal remedies. *The Federalist No. 32* (A. Hamilton) 553-54 (Cooke ed. 1961). For states' death acts to apply on the high seas produces no such "lamentable lack of uniformity." *The Hamilton, supra* at 406.

Uniformity of recoveries for deaths offshore is beyond the Court's reach in this case. The petitioner's position, that DOHSA supplants states' death acts on the high seas, promotes greater disuniformity than does the respondents'. The petitioner's position leads to recovery for loss of love and affection for deaths on fixed platforms off Louisiana, recovery for loss of society but not for loss of love and affection for deaths on states' territorial waters,

and recovery for neither for deaths on the high seas. The respondents' position leads to recovery for loss of love and affection both for deaths on fixed platforms and for deaths on the high seas, and to recovery of the closely related loss of society for deaths on states' territorial waters.

5. Congress has constitutionally enacted Section 7 of DOHSA, saving states' death acts on the high seas. The principle of separation of powers obliges this Court to apply Section 7, and to resist the petitioner's exhortation to repeal Section 7 judicially.

6. The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333, extends state law as surrogate federal law governing the Outer Continental Shelf. As surrogate federal law, states' death acts apply to deaths of platform workers on the high seas. *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473 (1981). Louisiana's death act is not inconsistent with federal law, because federal law, Section 7 of DOHSA, sanctions states' death acts.

7. The loss of a loved one's society, love and affection, is a very real and deep loss. *Sea-Land Serv. v. Gaudet,* 414 U.S. 573, 585-86 (1974). The petitioner's position would deny to survivors of those who meet wrongful death on the high seas recovery for this loss. Denial of recovery for this loss serves only to insulate wrongdoers from the consequences of their wrongs, without any corresponding benefit to society. Denial of recovery for these real and deep losses would be especially unconscionable here, since the Court has ample means by which to award full recovery: states' death acts, Section 7 of DOHSA, and OCSLA.

———o———

ARGUMENT

1. States may legislatively allow recovery for deaths on the high seas.

Historically, the general maritime law was thought to allow no recovery for wrongful death. *The Harrisburg,* 119 U.S. 199 (1886). As early as 1873, this Court permitted recovery under a state's wrongful death act for a death on the state's territorial waters. *American Steamboat Co. v. Chace,* 83 U.S. (16 Wall.) 522 (1873). Since, application of states' death acts to deaths on states' territorial waters has become commonplace. *Hess v. United States,* 361 U.S. 314 (1960); *United New York & New Jersey Sandy Hook Pilots Assoc. v. Halecki,* 358 U.S. 613 (1959); *The Tungus v. Skovgaard,* 358 U.S. 588 (1959); *Romero v. International Terminal Operating Co.,* 358 U.S. 354 (1959); *Levinson v. Deupree,* 345 U.S. 648 (1953); *Just v. Chambers,* 312 U.S. 383 (1941); *Western Fuel Co. v. Garcia,* 257 U.S. 233 (1921); *Sherlock v. Alling,* 93 U.S. (3 Otto) 99 (1876).

In 1883, the Fifth Circuit permitted recovery under Louisiana's wrongful death act, Article 2315 of the Louisiana Civil Code (Pet.App. E), for a death on the high seas. *The E. B. Ward, Jr.,* 17 Fed. 456 (C.C. La. 1883). The decedents had died on a steamship owned by citizens of Louisiana. The home port of the steamship had been in Louisiana.

Twenty-four years later, this Court endorsed *The E. B. Ward, Jr.* Two vessels, both belonging to Delaware corporations, had collided on the high seas. Speaking through Justice Holmes, the Court applied Delaware's wrongful death act, no more expansively worded than Louisiana's Article 2315, to allow recovery for deaths on the high seas. The Court recognized that the power of a

state to allow recovery for wrongful death is not strictly constrained by that state's boundaries.

> [T]he bare fact of the parties being outside the the territory, in a place belonging to no other sovereign, would not limit the authority of the state, as accepted by civilized theory . . . [A] statute [of a state] giving damages for death caused by a tort might be enforced in a state court, even though the tort was committed at sea.

The Hamilton, 207 U.S. 398, 403-404 (1907).

The principles underlying *The Hamilton* remain viable. In *Southern Pac. Co. v. Jensen,* 244 U.S. 205 (1917), this Court acknowledged that state legislation could provide "the right . . . to recover in death cases." 244 U.S. at 216. *The Hamilton* was mentioned by name in the 1920 House debate over the bill that became DOHSA. 59 Cong.Rec. 4482, 4483 (Mar. 17, 1920). In *Skiriotes v. Florida,* 313 U.S. 69 (1941), this Court relied upon *The Hamilton* to give effect to a state's criminal statute on the high seas. The Court saw no reason why a state could not constitutionally "govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress." 313 U.S. at 77. Dissenting in *Oil, Chemical & Atomic Workers, International Union v. Mobil Oil Corp.,* 426 U.S. 407, 435-436 (1976), Justice Stewart observed that this Court had "never struck down a state law on the ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean 'territory'."

In its amicus brief, the Government cited the Court to Alexander Hamilton's writings in *The Federalist* and to remarks by James Madison and Governor Randolph in the debates in the Virginia legislature over the proposed fed-

eral constitution (Gov't brief at 7-8 nn.3 & 4), purportedly in support of the petitioner's argument that states' death acts have no force on the high seas. Those sources support no such proposition.

Hamilton argued persuasively and successfully for investing the federal courts with jurisdiction in maritime causes. *E.g., The Federalist No. 80* (A. Hamilton). Hamilton saw maritime causes as appropriate grist for the federal mill because they "so commonly affect the rights of foreigners," *The Federalist No. 80* (A. Hamilton) 534, 538 (Cooke ed. 1961), that their resolution may influence international relations. Madison and Randolph agreed, advancing the same reason: resolution of maritime causes involving foreigners could influence international relations. 3 J. Eliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (Madison) & 571 (Randolph) (1836). The proponents of federal maritime jurisdiction gave no sign of seeing maritime disputes between citizens of the same state, like the instant case, as peculiarly suited for resolution in federal courts.

Randolph seems to have favored granting exclusive jurisdiction of maritime causes to federal courts, at least in disputes involving foreigners. But Madison saw state courts as appropriate forums for resolution of disputes between citizens. Speaking generally, with apparent reference to all disputes, maritime included, Madison said, "All controversies directly between citizen and citizen will still remain with the local courts." *Id.* at 538.

Hamilton militated for extension of federal jurisdiction to "cases of admiralty and maritime jurisdiction." *The Federalist No. 80, supra* at 540. This precise language found its way into Article III, Section 2, of the Constitution. This constitutional grant of jurisdiction to federal courts over maritime causes is not explicitly exclusive. Hamilton did not favor exclusive federal jurisdiction over maritime causes. Hamilton espoused concurrent state and federal jurisdiction as the general rule.

> When . . . we consider the state governments and the national governments as they truly are, in the light of kindred systems and as parts of ONE WHOLE, the inference seems to be conclusive that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited.

The Federalist No. 82 (A. Hamilton) 553, 555 (Cooke ed. 1961). Hamilton tightly circumscribed the situations when federal jurisdiction would oust state jurisdiction:

> An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*.

The Federalist No. 32 (A. Hamilton) 199-200 (Cooke ed. 1961). See to the same effect *The Federalist No. 82* (A. Hamilton) 553-554 (Cooke ed. 1961).

The Constitution did not "in express terms [grant] an exclusive authority" over maritime causes to the federal government. Nor did the Constitution on one hand grant an authority over maritime causes to the federal government and on the other hand prohibit states from exercising like authority. This Court has never viewed the exercise of state jurisdiction over maritime causes as "absolutely and totally *contradictory* and *repugnant*" to federal jurisdiction over maritime causes. *E.g., Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981); *Askew v. American Waterway Operators, Inc.*, 411 U.S. 325 (1973); *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Romero v. International Terminal Operating Co., supra; The Tungus v. Skovgaard, supra; Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *Davis v. Department of Labor & Indus.*, 317 U.S. 249 (1943); *Skiriotes v. Florida, supra; Just v. Chambers*, 312 U.S. 383 (1941); *Messel v. Foundation Co.*, 274 U.S. 427 (1927); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *The Hamilton, supra; American Steamboat Co. v. Chace, supra; Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Thus, state and federal jurisdiction over maritime causes is concurrent.

Hamilton's view prevailed. The constitutional grant of maritime jurisdiction in Article III, Section 2, to the federal government was not exclusive. Hamilton's view is entitled to great weight. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 418-419 (1821). This Court has always accorded such weight to Hamilton's view, recognizing that each state retains a "wide scope" of jurisdiction over maritime causes. *Romero v. International Terminal Operating Co., supra* at 373.

The Savings to Suitors clause in the Judiciary Act of 1789, 28 U.S.C.A. § 1333(1), effectuated Hamilton's notion

that state courts retained jurisdiction, in the judicial sense of that word, to adjudicate maritime causes. It follows that state legislatures have legislative jurisdiction to adopt and regulate remedies for application in maritime settings, and this Court has so held.

> [T]he jurisdictional act [28 U.S.C.A. § 1333(1)] does leave state courts "competent" to adjudicate maritime causes of action in proceedings "in personam" . . . [A] state, "having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit" so long as it does not attempt to make changes in the "substantive maritime law."

Madruga v. Superior Court, 346 U.S. 556, 560-561 (1953). To the same effect are *Romero v. International Terminal Operating Co., supra* at 372 n.32; and *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924).

The Fifth Circuit was correct, therefore, in deciding that states' death acts may apply on the high seas.

2. Louisiana's wrongful death act applies on the high seas.

Given the general principle that states' death acts may apply on the high seas, the question becomes whether Louisiana's death act, Article 2315, applies on the high seas.

It does.

The Supreme Court of Louisiana has held that the tort law of Louisiana does apply outside Louisiana's boundaries. *Romero v. State Farm Mut. Auto Ins. Co.*, 277 So.2d 649 (La. 1973); *Jagers v. Royal Indem. Co.*, 276 So.2d 309 (La. 1973). The Fifth Circuit has applied Article 2315 on the high seas. *The E. B. Ward, Jr., supra.* This Court has applied Article 1382 of the French Code Napoleon, the almost verbatim counterpart of Article 2315,

on the high seas. *La Bourgogne*, 210 U.S. 95 (1907). This Court has applied on the high seas the death act of Delaware, a statute no more geographically expansive than Article 2315. *The Hamilton, supra.*

States' death acts may apply on the high seas. Louisiana's does.

3. The Death on the High Seas Act, through Section 7, preserves application of Louisiana's death act on the high seas.

a) Section 7 and Selective Borrowing.

Section 7 of DOHSA reads:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

46 U.S.C.A. § 767.

The petitioner urges the Court to read out the first sentence of Section 7. This the Court cannot do. "It is [the Court's] duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section . . . ." *United States v. Menasche,* 348 U.S. 528, 538-539 (1955). "[A] statute should be interpreted so as not to render one part inoperative . . . ." *Colautti v. Franklin,* 439 U.S. 379, 392 (1979).

If Section 7 does not allow application of states' death acts on the high seas, it has no meaning at all. If Section 7 means anything, it means that states' death acts may apply on the high seas.

The first sentence of Section 7 saves state remedies, without saying exactly *where* it saves state remedies. The petitioner contends that Section 7 saves state remedies only in territorial waters.

Impossible.

DOHSA itself applies *only* on the high seas, and not in states' territorial waters. The second sentence of Section 7 makes that clear: "Nor shall this chapter apply to . . . any waters within the territorial limits of any State . . . ." 46 U.S.C.A. § 767. If DOHSA affects state law anywhere, it has to be where DOHSA does apply, on the high seas, and not where DOHSA does not apply, in states' territorial waters. The petitioner reads Section 7 to mean that DOHSA does not apply where DOHSA does not apply, *i.e.,* on states' territorial waters. The petitioner's reading makes Section 7 superfluous, if not absurd. No. DOHSA saves state remedies where DOHSA does apply: on the high seas.

The petitioner implies that this Court has carte blanche to "borrow selectively" in admiralty from state law, implying concomitantly carte blanche *not* to borrow selectively from state law. (Pet. brief 11-12) The petitioner mistakes who may borrow selectively, and when. The jurisprudence and Hamilton's writings in *The Federalist* spotlight the petitioner's error. Where Congress has remained silent, as it did until DOHSA, the courts may choose to make or not to make state law the maritime rule. *Milwaukee v. Illinois,* 451 U.S. 304, 313 (1981); *Van Beeck v. Sabine Towing Co.,* 300 U.S. 342, 347-49 (1937). In *The Hamilton,* this Court did choose to borrow states' death acts selectively as the rule in an admiralty setting, the high seas.

The Court's selective borrowing of states' death acts was in tune with Alexander Hamilton's notions. Hamilton favored federal jurisdiction over maritime causes. *The Federalist No. 80,* discussed at pages 8 through 10, *supra.* But federal jurisdiction over maritime causes

was not among the narrowly limited grants of exclusive federal jurisdiction. *The Federalist Nos. 32 & 82*, discussed at pages 9 and 10, *supra*. Hamilton. recognized that the constitutional extension of maritime jurisdiction to the federal courts could cause "partial inconveniencies." *The Federalist No. 80* (A. Hamilton), *supra* at 541. Hamilton saw Congress as empowered to cure such "partial inconveniencies."

> From this review of the particular powers of the federal judiciary, as marked out in the constitution, it appears, that they are all conformable to the principles which ought to have governed the structure of that department, and which were necessary to the perfection of the system. If some partial inconveniencies should appear to be connected with the incorporation of any of them into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such regulations as will be calculated to obviate or remove these inconveniencies.

Ibid.

Congress finally did act in 1920, passing DOHSA to "obviate" an "inconveniency" in the maritime law, and selectively borrowing from state law in the process. By including Section 7 in DOHSA Congress did, as Congress can, "selectively borrow" state law. See Hart & Wechsler, *The Federal Courts and the Federal System* 817-21 (2d ed. 1973). In legislatively correcting the "inconveniency" by selectively borrowing state law, Congress completed the process of selective borrowing. Congress has spoken, and the courts must now honor Congress's selection. "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner*, 104 S.Ct. 756, 764 (U.S. 1984).

b) The Legislative History of Section 7.

The petitioner seeks support in the House debates on DOHSA. The meaning of Section 7 is clear. Recourse to House debates is unnecessary and inappropriate. "[T]he debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body . . . ." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive'." *United States v. Turkette*, 452 U.S. 576, 580 (1981).

As the Fifth Circuit observed below, Section 7 is "clear." *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1282 (5th Cir. 1985). Inquiry into the legislative history is superfluous. The Court need only apply "the plain meaning of the plain words" of Section 7. *Id.* at 1289 (Jolly, J., concurring).

The petitioner and its amici brand the House debate on Section 7 as "confused." (Gov't brief 22. See also brief of Sonat et al. 16-17; Pet. brief 23.) Then out of the confusion they promptly seek to justify their position from the debate. If the debate is as confused as they contend, the debate can be no help in construing Section 7. That brings the Court back to the plain language of Section 7 itself.

In actuality, the legislative history of DOHSA supports application of states' death acts on the high seas.

The text of several unsuccessful predecessors of DOHSA demonstrates that the drafters knew how to preempt state law on the high seas if they wished: "[I]n all suits in admiralty recovery of damages for death . . .

shall be had only under the provisions of this Act . . . ." H.R. 24764, § 6, 62d Cong., 2d Sess. (1912); S. 6930, § 6, 62d Cong., 2d Sess. (1912); H.R. 65, § 6, 63d Cong., 1st Sess. (1913); S. 1661, 63d Cong., 1st Sess. (1913); H.R. 6143, § 7, 63d Cong., 1st Sess. (1913). Now that is how to preempt states' death acts on the high seas. But that is not what Congress wanted. So those bills failed!

The text of Section 7 differs strikingly from the unsuccessful text. Section 7 contains no such explicit exclusion of state remedies. To the contrary, Section 7 explicitly saves state remedies. Had Congress intended to exclude states' death acts from the high seas as the petitioner claims, Section 7 would resemble the earlier bills that Congress voted down. It is reasonable to conclude that the successful version of DOHSA owes its very passage to its reservation in Section 7 of rights under states' death acts.

One of the amicus briefs, Mr. Engerrand's, recalls interestingly from the debates on the unsuccessful bills. But the interest is solely academic. If recourse to legislative history were needed at all, the only chapter of the legislative history appropriate for present purposes would be the House debate on March 17, 1920, 59 Cong.Rec. 4482-4487 (Mar. 17, 1920), when DOHSA finally passed, and not the more remote legislative reports and proceedings in different Congresses, comprised of different members, on differently worded bills that never became law.

Before 1920, the general maritime law of the United States allowed no recovery for wrongful death. *The Harrisburg, supra.* But the Fifth Circuit had decided *The E. B. Ward, Jr., supra,* allowing recovery under Article 2315 of the Louisiana Civil Code for wrongful death on the high seas. And in *The Hamilton, supra,* this Court

had applied Delaware's wrongful death act on the high seas. By 1920, recovery under states' death acts for deaths on the high seas was firmly entrenched in this nation's law.

In 1920, Congress adopted DOHSA. One certainty is that Congress intended to *give* remedies, not to take away remedies. Nothing in DOHSA itself provides, or even implies, that existing remedies under state law for wrongful death on the high seas were to be abrogated. DOHSA says that survivors "*may* maintain a suit for damages" in admiralty. 46 U.S.C.A. § 761. But DOHSA does not forbid suits under state law, as DOHSA's unsuccessful ancestors had.

The remarks of the representatives who debated the relevant amendment to Section 7 of DOHSA, supporters and opponents alike, reflect the intent to give, not to take away. *E.g.*: "The object of this bill is to GIVE a cause of action in case of death resulting from negligence or wrongful act occurring on the high seas." 59 Cong.Rec. 4482 (Mar. 17, 1920) (emphasis added). "We GIVE a certain class of rights under this act. If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined." *Id.* at 4484 (remarks of Mr. Mann) (emphasis added). "This is to GIVE the right of action where there is none now in the federal court." *Ibid.* (remarks of Mr. Igoe) (emphasis added). "[I]f we are told that where that right of action now exists under State statutes that suit can be brought in State courts, we propose to pass an act to take away that right, I do not see how we are progressing." *Ibid.* (remarks of Mr. Mann) (emphasis added).

DOHSA allowed recovery of "pecuniary loss." 46 U.S.C.A. § 762. DOHSA passed in 1920, against a back-

drop of *The Harrisburg, supra.* By giving pecuniary loss in DOHSA, Congress established a floor, a uniform minimum recovery, more than had previously existed at general maritime law, but less than might be available under state law. Nothing in DOHSA or in the congressional debates evidences an intent to limit recovery under state laws to pecuniary loss. The reverse is true. As originally offered, Section 7 of the bill had read, "[T]ne provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act AS TO CAUSES OF ACTION ACCRUING WITHIN THE TERRITORIAL LIMITS OF ANY STATE." 59 Cong.Rec. 4482 (Mar. 17, 1920) (emphasis added). By negative implication, the emphasized language in the original bill might have limited application of states' death acts to the states' territorial waters, as the petitioner now contends. Much of the discussion in the House addressed the effect of the emphasized language. The representatives, adverting to *The Hamilton* by name, 59 Cong.Rec. at 4483, recognized that states' death acts applied on the high seas. Some felt that DOHSA should exclude state law on the high seas; others felt that states' death acts should remain in effect on the high seas.

To resolve all doubt, Representative Mann offered an amendment to strike the limiting phrase, "as to causes of action accruing within the territorial limits of any State." *Id.* at 4484. Representative Mann's purpose was manifest. He and his colleagues knew that states' death acts applied on the high seas. Another speaker had said as much, even referring by name to *The Hamilton, id.* at 4483, moments before Representative Mann offered his amendment. Representative Mann wanted to insure that

states' death acts still applied after passage of DOHSA as they had before passage. In Representative Mann's words:

> I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court . . . If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, WHETHER THE CAUSE OF ACTION ACCRUED WITHIN THE TERRITORIAL LIMITS OF THE STATE OR NOT.

Ibid. (emphasis added). Representative Volstead, by contrast, did not want states' death acts to apply on the high seas. In opposition to Representative Mann's amendment, Representative Volstead argued, "It would be a good deal simpler if we should leave the statute in the form in which it is drawn." *Id.* at 4485. To which Representative Mann aptly responded, "It would be a good deal wickeder." *Ibid.*

As ultimately adopted, Section 7 reads as Representative Mann's amendment changed it to read: "The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter . . . ." 46 U.S.C.A. § 767. The original limitation to "causes of action accruing within the territorial limits of any State" was eliminated. The only plausible inference is that Section 7 allows a state's death act to operate on the high seas, beyond the state's territorial limits.

The petitioner and its allied amici cite or quote at length from remarks of Representative Volstead, chief opponent of Representative Mann's amendment, and of Representatives Montague, Igoe, and Goodykoontz. (See, *e.g.*, Pet. brief 20, 26; Gov't brief 19-24; Engerrand brief

22-24.) This quartet favored abrogation of state remedies on the high seas, and therefore opposed Representative Mann's amendment. These four all voted AGAINST Representative Mann's amendment. 59 Cong.Rec. at 4487. They lost. Their views illustrate only what Congress's intent was NOT. Indeed, in *Moragne v. States Marine Lines*, 398 U.S. 375, 400 n.14 (1970), this Court referred to Representative Volstead's remarks about the exclusivity of DOHSA on the high heas, the same remarks as those upon which the petitioner and amici rely, as "erroneous."

The petitioner and its amici disparage Representative Mann's amendment as "ill considered" (Gov't brief 22 n.24), "last-minute" (Pet. brief 7, 22), and just a "compromise" (Pet. brief 21, 26) to get the bill through the House. Ill considered or not, the amendment is law, and has no less force than the most wisely considered measure. Nor does the amendment's late entry into the bill diminish its force. Early or late, the amendment is law. And as for being a compromise, is not compromise a way of life in Congress? If all legislative compromises were disregarded, the United States Code would shrink to pocket size.

c) Section 7 in the Lower Courts.

For more than sixty years, argue the petitioner and its amici (Pet. brief 15; Gov't brief 21-22, 29 n.32), all have assumed that DOHSA supplanted state law on the high seas. Translation: Old error is good error. The Government put its finger on the reason for that erroneous assumption: Many in the legal profession made the mistake of "attaching little significance to the Mann amendment" (Gov't brief 21-22), and of treating it as but "an innocuous change in language." *Wilson v. Transocean*

Airlines, 121 F.Supp. 85, 90 (N.D. Cal. 1954). It is time to give the amendment to Section 7 its due significance. That *The Harrisburg* had stood for eighty-four years did not deter this Court from correcting its injustices in *Moragne, supra.* Long-standing and wide acceptance do not entitle error to greater reverence.

In fact, the respondents' argument to Section 7 is not so bizarre as the petitioner and its amici represent. One line of cases indicates that DOHSA does bar application of states' death acts on the high seas. *Nygaard v. Peter Pan Seafoods*, 701 F.2d 77 (9th Cir. 1983); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Higa v. Transocean Airlines*, 230 F.2d 780 (9th Cir. 1955); *Jennings v. Goodyear Aircraft Corp.*, 227 F.Supp. 246 (D. Del. 1964); *Wilson v. Transocean Airlines, supra.* But a more modern line of cases, including the instant case, recognizes that states' death acts may apply on the high seas. *Tallentire v. Offshore Logistics, Inc., supra;* In re *Exxon Corp.*, 548 F.Supp. 977 (S.D. N.Y. 1982); *Alexander v. United Technologies Corp.*, 548 F.Supp. 139 (D. Conn. 1982); *Rairigh v. Erlbeck*, 488 F.Supp. 865 (D. Md. 1980); *Chute v. United States*, 466 F.Supp. 61, 65 n.9 (D. Mass. 1978); *Lowe v. Trans World Airlines*, 396 F.Supp. 9 (S.D. N.Y. 1975); *Safir v. Compagnie Generale Transatlantique*, 241 F.Supp. 501 (E.D. N.Y. 1965); *Ledet v. United Aircraft Corp.*, 10 N.Y.2d 258, 176 N.E.2d 820 (1961). See also *Hayden v. Krusling*, 531 F.Supp. 468 (N.D. Fla. 1982).

Logic supports the more modern view. Most simply stated, if in enacting DOHSA Congress had chosen to bar application of states' death acts on the high seas, Congress could have done so. Neither the wording of DOHSA nor the legislative history indicates congressional intent to bar states' death acts. The language of DOHSA is per-

missive, not mandatory. Suitors "*may* maintain a suit for damages", 46 U.S.C.A. § 761, in admiralty. But it does *not* follow that such actions arise *only* under admiralty law, to the exclusion of states' death acts.

At the request of Chief Justice Warren, the American Law Institute studied this and similar questions stemming from the interplay of federal and state powers. After reviewing both lines of cases, the American Law Institute, under the direction of Herbert Wechsler, opted in favor of the more recent line, concluding "that concurrent jurisdiction ought to be permitted" in actions for deaths on the high seas. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 237 (1969). The American Law Institute found no "compelling reason" to make federal jurisdiction exclusive. *Id.* at 236. "While this study is obviously not binding, it is highly persuasive as a more modern view." *Rairigh v. Erlbeck, supra* at 867.

The petitioner and its amici seek support in law review articles, especially R. M. Hughes's article, *Death Actions in Admiralty,* 31 Yale L.J. 115 (1921). Mr. Hughes's views, they argue, are entitled to great weight because he was "a principal drafter" of DOHSA. (Pet. brief 20 n.4. See also Gov't brief 24 n.28.) [The Congressional Record also reveals that R. M. Hughes represented British Steamship Company. J. Bryan, Extension of Remarks, H.R., 63d Cong., 3d Sess., 52 Cong.Rec. (App.) 31, 32 (1914).] But the version of DOHSA which Mr. Hughes helped to write lacked Representative Mann's amendment to Section 7. It would not be surprising if

Representative Mann's amendment disappointed Mr. Hughes. But not even Mr. Hughes could deny that Section 7 preserves to states' death acts whatever force they had before DOHSA. Mr. Hughes's comment that Section 7 "is a mere savings clause, and does not give the [states'] statutes any effect that they did not have regardless of it," 31 Yale L.J. at 123, inescapably implies that states' death acts keep whatever effect they had on the high seas before DOHSA.

d) The Decisions of This Court.

Whether DOHSA, through Section 7, permits states' death acts to apply on the high seas, is before this Court for the first time. Dicta in this Court's earlier decisions do not support the petitioner's position. To the contrary, those dicta support the respondents' position.

The petitioner leans first on *Southern Pac. Co. v. Jensen,* 244 U.S. 205 (1917), where the Court declined to apply New York's workmen's compensation act on New York's territorial waters. The Court reasoned that Article I, Section 8, of the United States Constitution, conferring upon Congress the power "to make all Laws," left no room for states' compensation statutes. But the Court went on to say, "[I]n the absence of some controlling statute, the general maritime law . . . constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction . . . ." 244 U.S. at 215. The first clause of the quoted passage, "in the absence of some controlling statute," clearly implies that Congress can, by "some controlling statute," permit operation of state statutes in the admiralty and maritime field concurrently with federal law, which is precisely what Section 7 of DOHSA does. The Court acknowledged that even absent a statute of Congress, state statutes can

operate in the admiralty and maritime field, citing *The Hamilton, supra,* as an example. 244 U.S. at 216. A fortiori, states' death acts can apply when saved by "some controlling [federal] statute" like Section 7.

The petitioner admits, as it must, that Congress can "selectively borrow" state law. (Pet. brief 11.) See Hart & Wechsler, *The Federal Courts and the Federal System* 817-21 (2d ed. 1973). Before *Jensen,* Congress had not "selectively borrowed" states' workmen's compensation acts to apply on navigable waters. Accordingly, this Court denied effect on navigable waters to New York's workmen's compensation law. In *Jensen,* there was no federal statute like DOHSA, and no savings clause like Section 7 manifesting congressional intent to borrow state law selectively.

This Court indicated in *Jensen* that state legislation may affect matters maritime unless: (1) it contravenes the essential purpose expressed by an act of Congress; or (2) it materially prejudices characteristic features of maritime law; or (3) it interferes with the proper harmony and uniformity of maritime law. 244 U.S. at 216. But this expression presupposed three circumstances not present here:

(1) That an existing maritime rule already permitted recovery of compensatory damages, which recovery New York's workmen's compensation law would have reduced to compensation benefits;

(2) That this Court had not previously sanctioned application of states' workmen's compensation laws in maritime locales; and

(3) That Congress had not already statutorily saved states' workmen's compensation remedies in maritime locales.

Before *Jensen* and before DOHSA, the courts, including this one, had already recognized recovery for death on the high seas under state law as the rule in maritime locales. In Section 7, Congress expressly saved the existing rule in maritime locales, *viz.,* application of states' death acts on the high seas. This Court's language in *Jensen,* limiting application of state law in maritime locales, therefore, does not apply here because of the significantly different legal and factual settings between *Jensen* and this case. This Court indicated as much in *Jensen,* citing *The Hamilton* as an example that state law could provide "the right . . . to recover in death cases." 244 U.S. at 216.

But even if states' death acts did have to meet the three conditions of *Jensen* in order to apply to deaths on the high seas, they do so:

(1) States' death acts do not contravene the "essential purpose" of DOHSA, which is to *grant* recovery for death on the high seas. Indeed, states' death acts advance that essential purpose. True, states' death acts may allow more than DOHSA's "pecuniary loss," 46 U.S.C.A. § 762, but *limiting* recovery to pecuniary loss is certainly *not* DOHSA's "essential purpose." For a state remedy to award a greater recovery than a federal remedy does not insure the demise of the state remedy. *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715 (1980).

(2) States' death acts materially prejudice no characteristic feature of maritime law. The rule already prevailing on the high seas when *Jensen* was decided in 1917, and when DOHSA became law in 1920, was recovery under state law for death on the high seas. *The Hamilton; The E. B. Ward, Jr.,* both *supra.* Far from prejudicing any characteristic feaure of maritime law, recovery for death on the high seas under state law *was* already and *is* still a

characteristic feature of maritime law. One characteristic feature of maritime law is to grant, not to deny, full recovery for damages. "It better becomes the humane and liberal character of proceedings in admiralty to give than withhold the remedy." *The Sea Gull,* 21 F.Cas. 909, 910 (C.C. Md. 1865) (No. 12,578). Recovery under states' death acts comports with that characteristic feature of maritime law.

(3) Recovery under states' death acts does not detract from uniformity of maritime law, such as it is. Respondents address this issue in detail at pages 34 through 40 of this brief.

Nor does *Jensen's* sequel, *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920), negate application of states' death acts on the high seas. Citing *Knickerbocker,* the Government argues (Gov't brief 25-26 n.30) that the Court should disregard Section 7 of DOHSA by which Congress saved, or selectively borrowed, state law in a maritime setting. There is something so hallowed about a maritime setting, the Government's argument seems to imply, that not even Congress can constitutionally sanction application of state law in a maritime setting. But if that is so, then this Court must disregard also the Savings to Suitors clause in the Judiciary Act of 1789, 28 U.S.C.A. § 1333(1), because that is exactly what the Savings to Suitors clause does: It saves state remedies in maritime settings. Thus, for the Court to disregard the savings clause in Section 7 of DOHSA would gravely undermine the Savings to Suitors clause in the Judiciary Act of 1789.

Jensen and its progeny like *Knickerbocker Ice Co.* soon ran into a hail of criticism. This Court "severely limited" *Jensen, Standard Dredging Corp. v. Murphy,* 319 U.S. 306, 309 (1943), observing that *Jensen* had "no vitality beyond that which may continue as to state workmen's compensation laws." *Ibid.* More recently this Court noted that "*Jensen* and *Knickerbocker Ice* have been confined to their facts . . . ." *Askew v. American Waterways Operators, Inc.,* 411 U.S. 325, 344 (1973). No sooner were *Jensen* and *Knickerbocker* decided than this Court found a way to apply even a state workmen's compensation statute on navigable waters. *Grant Smith-Porter Ship Co. v. Rohde,* 257 U.S. 469 (1922). *Jensen* and its progeny have never been obstacles to application of state law, other than state workmen's compensation statutes, in maritime settings. Notwithstanding *Jensen* and its progeny, this Court has allowed application on navigable waters of states' survival and death acts, *Just v. Chambers,* 312 U.S. 383 (1941); *Western Fuel Co. v. Garcia,* 257 U.S. 233 (1921), state lien statutes, *Vancouver S.S. Co. v. Rice,* 288 U.S. 445 (1933), state rules for partition and sale of ships, *Madruga v. Superior Court,* 346 U.S. 556 (1954), state arbitration statutes, *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109 (1924), state insurance statutes, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310 (1955), state laws imposing unemployment insurance taxes, *Standard Dredging Corp. v. Murphy, supra,* and state statutes concerning water pollution, *Askew v. American Waterways Operators, Inc., supra,* and air pollution. *Huron Portland Cement Co. v. Detroit,* 362 U.S. 440 (1960). It is clear that *Jensen* and its progeny affect only states' workmen's compensation laws, and not states' death acts on the high seas.

This case involves deaths on the high seas, and a federal statute saving remedies under states' death acts. *Western Fuel Co. v. Garcia, supra,* cited by the petitioner, involved a death on navigable waters of a state, but no federal statute like Section 7 of DOHSA saving remedies un-

der state law. In *Western Fuel,* the defendant made the same argument to this Court that the petitioner makes here: *Jensen* precludes application of the state's death act because it materially prejudices characteristic features of general maritime law and interferes with the proper harmony and uniformity of that law. A unanimous Court, speaking through Justice McReynolds, rejected the petitioner's argument, saying:

> The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts when following the common law will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. *Southern P. Co. v. Jensen, supra.*

257 U.S. at 242. The effect of state law upon maritime uniformity is the same, whether in the state's waters, or on the high seas off the coast of a state. If state law does not prejudice characteristic features of maritime law and does not interfere with the proper harmony and uniformity of maritime law on the navigable waters of the state, neither does it on the high seas off the coast of the state, especially when only citizens of that state are involved, and when a federal statute, Section 7 of DOHSA, sanctions state law on the high seas.

The petitioner has cited *Messel v. Foundation Co.,* 274 U.S. 427 (1927), for the proposition that, "State remedies do not extend to the high seas by sheer force of state tort law." (Pet. brief 5.) The case does not support that proposition. Messel worked for a builder and repairer of ships. Messel sustained injury aboard a vessel on the Mississippi River at New Orleans and sued his employer in state court for damages. Following *Southern Pac. Co. v. Jensen,* this Court simply held that Louisiana's workmen's compensation act did not bar Messel from suing his employer for damages. The Court held that Messel could bring his tort action in state court, and could bring it under Article 2315 of the Louisiana Civil Code and the Saving to Suitors clause of the Judiciary Act of 1789. 28 U.S.C.A. § 1333. This Court counselled the state court that, "The principles applicable to Messel's recovery . . . must be limited to those which the admiralty law of the United States prescribes. . . ." 274 U.S. at 434. Though not perfectly clear, this caution apparently meant that the state court had to apply substantive standards of care prescribed by admiralty law. See *La Bourgogne,* 210 U.S. 95 (1907). But the court *did* allow Messel to proceed under Louisiana's Article 2315 for an injury on Louisiana's territorial waters. The Court did not suggest that Article 2315 would not apply to a death on the high seas. Understandably, the decision did not even mention, much less overrule, *The Hamilton,* where the accident occurred on the high seas and involved no state's workmen's compensation act.

Moragne v. States Marine Lines, 398 U.S. 375 (1970), does not bar application of state law on the high seas. *Moragne* dealt with a death on territorial waters of Florida, not a death on the high seas. The void which this Court intended to fill in deciding *Moragne* was the lack of a general maritime death action in states' territorial waters only. It had to be. Ample bases for recovery on the high seas beyond states' territorial limits already existed in the form of DOHSA, the Jones Act, and states' death acts. As this Court held in *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978), *Moragne* does not apply on the high seas. So whatever effect it may have on states' territorial waters, *Moragne* has no effect on the high seas.

At least one lower court has held that *Moragne* preempts states' death acts in states' territorial waters. In re *S.S. Helena*, 529 F.2d 744 (5th Cir. 1976). In re *S.S. Helena* is wrongly decided. There, the Fifth Circuit postulated that the principal reason for applying states' death acts in states' territorial waters had been the absence of a remedy for death under the general maritime law. *Moragne*, reasoned the Fifth Circuit, filled the void and "undercut the preexisting rationale for federal recognition of state wrongful death statutes." 529 F.2d at 752. The Fifth Circuit erroneously assumed that the mere recognition of a right of recovery in maritime law had ousted the right of recovery under state law. Certainly, nothing in *Moragne* explicitly dictates suppression of state remedies. To the contrary, this Court's language in *Moragne* better comports with concurrent federal and state remedies in territorial waters. The Court called it an "incongruity" for states "to provide the sole remedy." *Moragne*, *supra* at 401 n.15. But only that: an incongruity for states to provide the *sole* remedy. The Court saw no incongruity for states to provide a *concurrent* remedy. The Court considered "Federal law, rather than State . . . the more appropriate source of a remedy," *ibid.*, but that is a far cry from denouncing state remedies as inappropriate. The Court's use of the comparative adverb "more" to modify "appropriate" implies that both sources, federal and state, are appropriate. To say that the state remedy is appropriate, though perhaps not so appropriate as the federal, is not tantamount to denouncing the state remedy as "absolutely and totally *contradictory* and *repugnant*" to the federal remedy. *The Federalist No. 32* (A. Hamilton) 199, 200 (Cooke ed. 1961). If the Court had meant in *Moragne* to overrule *American Steamboat Co. v. Chace* and the long line of cases following it, *supra* at page 6,

it would have done so as unequivocally as it overruled *The Harrisburg, supra.* 398 U.S. at 409. The Court did not overrule the line of cases beginning with *American Steamboat v. Chace.* A federal remedy does not *ipso facto* oust state remedies, even when the federal measure of recovery differs from the state measure. *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715, 724-25 (1980). Federal and state remedies may exist side by side. This Court has refused to abandon that principle "in the name of 'uniformity'," *id.* at 726, and should refuse to abandon it now.

This Court has never decided and need not now decide whether *Moragne* supplants state law in states' territorial waters. Assuming *arguendo* that *Moragne* does supplant state law in states' territorial waters, it does not follow that DOHSA similarly supplants state law on the high seas. *Moragne* is a creature of decisional law, not statutory law. In the decisional law, there is no statute explicitly saving application of state law in states' territorial waters as Section 7 of DOHSA saves application of state law on the high seas.

Dicta in *Moragne* support the Fifth Circuit's application of Louisiana's death act on the high seas through Section 7. This Court condemned as "erroneous" the construction of Section 7 of DOHSA espoused during the House debates, 59 Cong.Rec. 4482-4487 (Mar. 17, 1920), by the minority in the House, which same reprobated view the petitioner now presses upon the Court. 398 U.S. at 400 n.14. *Moragne* also teaches that, "[T]he message of [DOHSA] is that it does not by its own force abrogate available state remedies. . . ." 398 U.S. at 400.

The issue in *Mobil Oil Corp. v. Higginbotham, supra,* and the only issue, was whether DOHSA superseded the general maritime law wrongful death action under *Moragne* in waters overlying the Outer Continental Shelf seaward of the boundary of the adjacent state. As between DOHSA and the general maritime law only, *Higginbotham* held that DOHSA prevails, to the exclusion of the general maritime law. That is understandable. In adopting DOHSA, Congress saved states' death acts on the high seas, but not general maritime law as thought to exist before 1920. But there *Higginbotham* stopped. No party in *Higginbotham* contended that states' death acts applied on the high seas. Nor did this Court consider whether DOHSA preempted a state's death act on the high seas.

The Lottawanna, 88 U.S. (21 Wall.) 558 (1875), does not preclude application of states' death acts on the high seas. At issue in *The Lottawanna* was a claim of a lien under state law for materials supplied to a vessel on a state's territorial waters, not a claim under state law for death on the high seas. This Court disallowed the lien, but only after pointing out that but for the claimant's failure to perfect his lien in accordance with the state statute, and the existence of an admiralty rule directly on point, the lien under the state statute would "undoubtedly" have been valid. 88 U.S. (21 Wall.) at 579. Notwithstanding *The Lottawanna,* this Court has permitted a state statute to create a lien on a vessel involved in a fatality on the state's territorial waters. *Vancouver S.S. Co. v. Rice,* 288 U.S. 445 (1933).

Moreover, *The Lottawanna* preceded *The Hamilton* by thirty-two years. If *The Lottawanna* ever did bar

states' death acts on the high seas, *The Hamilton* overruled it.

Nor does *Lindgren v. United States,* 281 U.S. 38 (1930), prohibit application of states' death acts on the high seas. The decedent there was a Jones Act seaman. The Jones Act, 46 U.S.C.A. § 688, was passed in 1920, the same year as DOHSA. But the Jones Act conspicuously lacks the savings clause that Section 7 of DOHSA contains. So in *Lindgren,* this Court held the Jones Act to bar application of states' death acts to the deaths of Jones Act seamen. To the same effect is *Gillespie v. United States Steel Corp.,* 379 U.S. 148 (1964). But here the decedents were not seamen. And DOHSA does contain Section 7.

The decedent in *Nygaard v. Peter Pan Seafoods, Inc.,* 701 F.2d 77 (9th Cir. 1983), was a seaman. *Nygaard* reached a result consistent with *Gillespie* and *Lindgren,* but not for correct reasons. This Court should decline to follow *Nygaard* here. Not once did the Ninth Circuit mention Section 7. The Ninth Circuit simply ignored Section 7. How the Ninth Circuit would have decided had it adverted to Section 7 is anyone's guess. But an appellate decision that overlooked Section 7 is no guide to interpreting Section 7.

The survivors of Tallentire and Taylor, who were not Jones Act seamen, do have rights under Louisiana's death act, notwithstanding that they died on the high seas. And Section 7 of DOHSA, so conspicuously missing from the Jones Act, saves those remedies.

4. Application of states' wrongful death acts on the high seas has not prejudiced uniformity of maritime law.

The petitioner, the defendant below, decries the Fifth Circuit's adherence to *The Hamilton* and to the plain meaning of Section 7 as disruptive of the uniformity desired at maritime law. A party's position on uniformity seems to depend upon whose ox is being gored. Here, state law will cost the defendant, so it urges uniformity to defeat state law. In *Moragne*, uniformity would have cost the defendant, so it urged state law at the expense of uniformity.

This Court long ago settled that application of states' death acts on the high seas does not produce "any lamentable lack of uniformity." *The Hamilton*, 207 U.S. at 406. More recently, the Court has said, "[U]niformity is not offended by 'the right given [by state law] to recover in death cases'." *The Tungus v. Skovgaard*, 358 U.S. 588, 594 (1959). Chief Justice Hughes, speaking for a unanimous Court in *Just v. Chambers*, 312 U.S. 383, 392 (1941), said:

> Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved. But as admiralty takes cognizance of maritime torts, there is no repugnancy to its characteristic features either in permitting recovery for wrongful death or in allowing compensation for a wrong to the living to be obtained from a tortfeasor's estate.

Uniformity does not now prevail in death cases. The Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1333, extends state tort laws to fixed platforms on the Outer Continental Shelf as surrogate federal law. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). Louisiana's death act allows recovery of non-pecuniary loss, including loss of love and affection, for deaths on platforms. Under *Moragne* and *Sea-Land Serv. v. Gaudet*, 414 U.S. 573 (1974), loss of society, but not loss of love and affection, is recoverable for deaths in states' territorial waters. Under DOHSA, neither loss of society nor loss of love and affection is recoverable for deaths on the high seas. *Mobil Oil Corp. v. Higginbotham, supra.*

No matter how the Court decides this case, uniformity cannot be achieved. Multiformity will persist.

The petitioner militates for the same measure of damages in this case as in *Mobil Oil Corp. v. Higginbotham:* pecuniary loss only; no loss of society and no loss of love and affection. *Higginbotham* itself produced disuniformity in maritime law: "slightly narrower" recovery, 436 U.S. at 624 n.18 on the high seas under DOHSA than in states' territorial waters under *Moragne*, and considerably narrower recovery on the high seas under DOHSA than on fixed platforms in the high seas, where state law applies.

To apply Louisiana's death act on the high seas under Section 7, as the respondents urge, would mean perhaps broader recovery on the high seas under state law

than in states' territorial waters under *Moragne*, but the same recovery on the high seas as on the fixed platforms in the high seas.

The respondents' position makes identical two of the three measures of recovery, those on the high seas and those on platforms. The petitioner's position produces a different measure of recovery for each of the three locales.

The respondents' position produces full compensation for death in two locales out of the three, on the high seas and on the platforms. The petitioner's position allows full compensation for death in only one locale, the platforms.

The respondents' position honors the integrity of the federal statute, Section 7. The petitioner's position does violence to the statute, under the guise of seeking a uniformity unattainable in this case.

If lack of uniformity displeases the Court, this case affords the Court a chance to sound the call to Congress for comprehensive national legislation. But the Court cannot usurp the legislative prerogative and judicially repeal Section 7.

Even if adherence to Section 7 of DOHSA promoted greater disuniformity than already exists, this Court would have no alternative but to affirm. Section 7 plainly saves state remedies on the high seas, and "a desire for uniformity cannot override the statute." *Mobil Oil Corp. v. Higginbotham, supra* at 624.

The petitioner complains that the application of states' death acts on the high seas would produce confusion, because their provisions are not always identical with the general maritime law. This problem is illusory. Traditionally, admiralty courts have enforced rights created under state statutes.

It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. . .

State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action. Federal courts have enforced these statutes. . .

> [A]ll these laws and others have been accepted as rules of decision . . . in admiralty cases, even, at times, when they conflicted with the rule of maritime law which did not require uniformity. "In the field of maritime contracts," this Court has said, "as in that of maritime torts, the National Government has left much regulatory power in the States." Thus, if one thing is clear it is that the source of law in saving-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Romero v. International Terminal Operating Co., supra at 373-374 (1959). "[W]hen admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. . . ." *The Tungus v. Skovgaard, supra* at 592. In applying a state's wrongful death action, the courts need only do so as would a court of that state. That was never an insurmountable problem under *American Steamboat Co. v. Chace* and its progeny. "Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades." *Sea-Land Serv. v. Gaudet, supra* at 584 (Brennan, J.). It will not be an in-

surmountable problem now. This Court need not become mired in minutiae like the identity of proper party beneficiaries of actions. Those questions can be resolved upon "further sifting through the lower courts in future litigation," as this Court directed in *Moragne, supra* at 408.

What, for example, if state law and maritime law exact different standards of care? The petitioner considers it incongruous for states' substantive tort law to infringe upon nationally or internationally established rules of navigation. This Court's decision in *La Bourgogne,* 210 U.S. 95 (1908), offers a simple and workable answer. In a collision between two foreign vessels on the high seas, this Court applied general maritime rules of navigation as followed in the United States to determine responsibility for the collision, but the law of the ship's flag, France, to determine the right to recover damages for death. By analogy, general maritime law would determine fault in an accident on the high seas, but in a claim under state law via Section 7, state law would determine the right to recover and the measure of damages.

The amici curiae bemoan that substantive provisions of states' death acts differ from state to state. It is only obvious that substantive provisions of death acts differ from state to state. But those differences were no less obvious to Congress when it passed Section 7 of DOHSA in 1920 than they are today. In passing Section 7, Congress clearly intended that the substantive differences among states' death acts would persist, on the high seas as well as on land.

Substantive differences among the death acts of states create no genuine difficulty. The choice of the appropriate state death act will be but an accustomed exercise in conflicts of laws, the likes of which are quite familiar to the

courts. "Courts constantly enforce rights arising from and depending upon other laws than those governing the local transactions of the jurisdiction in which they sit." *The Hamilton, supra* at 406.

In the instant case, there is not even a true conflict of laws. All relevant contacts are with Louisiana. Both decedents, both widows, and Taylor's daughter all resided in Louisiana. Both Tallentire and Taylor worked for employers in Louisiana. Both regularly flew from airports in Louisiana to work on fixed platforms off Louisiana, and returned to airports in Louisiana. The helicopter belonged to Air Logistics, a company domiciled and headquartered in Louisiana, was based on land in Louisiana, and was heading for Louisiana from a fixed platform off Louisiana at the time of the crash. Since all relevant contacts were with Louisiana, this was a "false conflict." *Jagers v. Royal Indem. Co., supra* at 311. As in *Jagers v. Royal Indem. Co.* and *Romero v. State Farm Mut. Auto Ins. Co.*, both *supra*, the courts of Louisiana would surely have applied Article 2315, Louisiana's death act, notwithstanding that the crash occurred outside Louisiana's boundaries.

Amici Sonat et al. warn of "tensions and discrepancies" between state law and federal law if states' death acts apply on the high seas. (Sonat brief 16.) State-federal tensions are nothing new or sinister; they abound in our form of government. What is the system of checks and balances in our national government, if not tensions working against one another to keep each branch of government within constitutional parameters? What is our two-party system, if not tensions working against one another to make politicians responsive to the electorate? How can we have a central government and fifty sovereign states

without tensions? Congress knows that federal-state tensions exist, and sometimes chooses "to tolerate whatever tension" there is. *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615, 625 (U.S. 1984). In Section 7, Congress chose to tolerate a tension. As this Court conceded in *Silkwood*, "We can do no less." 104 S.Ct. at 625.

5. Separation of powers demands judicial adherence to Section 7 of the Death on the High Seas Act and application of Louisiana's wrongful death act on the high seas.

At work here is a higher principle than uniformity: separation of powers. No one has seriously questioned that Congress had the constitutional authority to pass DOHSA, including Section 7. For this Court to read Section 7 out of DOHSA on grounds that it compromises maritime uniformity, would encroach impermissibly upon the legislative prerogative. Courts cannot ignore plain and unambiguous language of a constitutionally enacted statute, even if the courts believe the statute unwise.

> Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto. . .
>
> [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our constitution vests such responsibilities in the political branches.

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-195 (1978). Whether Section 7 of DOHSA contributes to uniformity or to disuniformity, this Court is bound to follow it.

Concurring below, Judge Jolly feared creating "a mess in more than a few cases." 754 F.2d at 1289. If there is a mess, it is not the decision below which has created it. Admiralty in our federal system has long been thought a mess. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 Sup.Ct.Rev. 158. No way the Court decides this case will clear the mess, real or imagined. If a mess there is, it is for Congress to clear. The mess will be far worse if the Court oversteps its constitutional bounds and tries to clear the mess by judicially repealing Section 7. Judicial repeal of Section 7 would send a message to this nation that any statute the Court dislikes is fair game. To open season on all federal statutes would create an unprecedented "torrent of difficult litigation." *Moragne v. States Marine Lines, supra* at 408.

If death is a composer of strife, *Cortes v. Baltimore Insular Lines*, 287 U.S. 367, 371 (1932), then so is judicial adherence to the statutes of Congress. The "torrent of difficult litigation" that followed *The Harrisburg, Moragne v. States Marine Lines*, 398 U.S. at 408, would seem but a trickle were this Court to read Section 7 out of DOHSA. For to read out Section 7, even if the Court deems Section 7 ill advised, would set the precedent that the courts can judicially veto acts of Congress, dangerously undermining the stability of our tripartite system of government.

The petitioner argues that federal courts should not "fashion rules of decision in admiralty . . . more generous . . . than . . . DOHSA." (Pet. brief 16-17). The respondents want the Court to fashion nothing, and they want nothing more generous than DOHSA. But the respondents do call upon the Court to apply all of DOHSA, including Section 7. The petitioner, on the other hand, wants the

Court to apply DOHSA selectively, giving force to Section 2, 46 U.S.C.A. §762, which gives only "pecuniary loss," but not to Section 7, which saves states' death acts on the high seas. The Court is bound to apply the whole of DOHSA. "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Badaracco v. Commissioner*, 104 S.Ct. 756, 764 (U.S. 1984). This Court has recognized that, "Perhaps the wisdom we possess today would enable us to do a better job of repudiating *The Harrisburg* than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute. . . ." *Mobil Oil Corp. v. Higginbotham*, *supra* at 626-627.

This Court, therefore, must decline the petitioner's invitation to repeal Section 7 judicially.

6. The Outer Continental Shelf Lands Act extends state law as surrogate federal law controlling deaths of platform workers on the high seas.

In the lower courts the respondents urged that Section 7 of DOHSA aside, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333, requires application of Louisiana's death act to the instant case as surrogate federal law. The Fifth Circuit did not accept this argument, but did apply Louisiana's death act by dint of Section 7 of DOHSA. OCSLA provides a discrete basis for the same result.

OCSLA provides:

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal Laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the

> law of the United States for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf. . . .

43 U.S.C.A. §1333(a)(2)(A).

A misconception in some quarters is that OCSLA applies only within the physical confines of a platform. That misconception must be dispelled.

The landmark case of *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969), involved two fatalities. One victim, Dore, was operating a crane mounted on a fixed platform seaward of Louisiana's boundary. The crane toppled from the platform onto a barge below, afloat on navigable waters of the Gulf of Mexico. Dore was injured and killed when he and the crane landed on the barge. Consistent with the then prevailing precept that locality alone determined the nature of a tort, the Fifth Circuit applied DOHSA rather than OCSLA. *Dore v. Link Belt Co.*, 391 F.2d 671 (5th Cir. 1968), *rev'd* sub nom. *Rodrigue v. Aetna Cas. & Sur. Co.*, *supra*. But this Court reversed, applying OCSLA even though the platform worker had died on the barge, a traditionally maritime locale on the high seas, beyond the physical confines of the platform. This Court applied Louisiana's death act as the surrogate federal law on the barge on the high seas, and not DOHSA. This Court emphasized the close relationship between platform workers and adjacent states, and the unsuitability of admiralty law to deal with the search for underground resources. 395 U.S. at 363.

Subsequently, the Fifth Circuit applied the substantive law of Texas as surrogate federal law on the Outer Continental Shelf to the death of another platform work-

er, killed while aboard a vessel afloat on the high seas. In re *Dearborn Marine Serv.*, 499 F.2d 263 (5th Cir. 1974). The court reasoned that, "These concerns about the close relationship between platform workers and their adjacent states and about the non-maritime character of platform operations indicate to us that Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform." 499 F.2d at 273.

Similarly, in *Bible v. Chevron Oil Co.*, 460 F.2d 1218 (5th Cir.), *cert. denied*, 409 U.S. 984 (1972), and *Bertrand v. Forrest Corp.*, 441 F.2d 809 (5th Cir.), *cert. denied*, 404 U.S. 863 (1971), the Fifth Circuit applied the substantive law of the adjacent state as surrogate federal law under OCSLA, where platform workers died in the Gulf. These cases are consistent with congressional intent that state law, as surrogate federal law, not be confined to the platforms.

This Court's decision in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), is enlightening. There, a platform worker had been transferred from a fixed platform on the Outer Continental Shelf to a crew boat on the high seas. After the platform worker had been aboard the boat for some time, a wave washed him across the deck, injuring him. The worker sued in state court under state law. This Court granted writs to consider two issues:

(1) Whether state courts have concurrent jurisdiction with federal courts to decide cases arising under OCSLA; and

(2) Whether in a case arising under OCSLA the jury should be instructed that awards are not taxable.

The precise issue of whether OCSLA applied aboard the vessel on the high seas was not before this Court. However, the Court commented without question that the lower

court had "acknowledged that OCSLA governed the case," 453 U.S. at 477, and implicitly agreed that OCSLA governed the injuries to a platform worker aboard a ship on the high seas. Otherwise, this Court would not have undertaken to grapple with either of the two issues expressly presented. Neither question would have been presented unless OCSLA extended the substantive law of the adjacent state to the platform worker's injury aboard the crew boat on the high seas. An inescapable inference from this Court's decision in *Gulf Offshore*, therefore, is that OCSLA extends the substantive law of the adjacent state to accidents involving platform workers on the high seas.

The instant case is closely analogous to *Gulf Offshore*. The victims in both cases were platform workers being evacuated from platforms to the adjacent state in advance of storms, Tallentire and Taylor by helicopter, the victim in *Gulf Offshore* by crew boat. The petitioner's helicopter above the high seas was performing the same function as the crew boat on the high seas in *Gulf Offshore*. See *Ledoux v. Petroleum Helicopters, Inc.*, 609 F.2d 824 (5th Cir. 1980). As it did in *Gulf Offshore*, this Court should again apply the substantive law of the adjacent state as the surrogate federal law adopted by OCSLA.

The victim in *Gulf Offshore* did not die as Tallentire and Taylor did, but the general maritime law would have provided him a remedy for his injury had he chosen to invoke it. Notwithstanding that fact, this Court treated his claims as within the provisions of OCSLA extending state law seaward as the surrogate federal law, and thus overlapping with the general maritime law on the high seas. There is no hint in this Court's opinion, nor is there any reason to believe, that a different result would have obtained had the victim in *Gulf Offshore* died.

In the instant case, the Fifth Circuit declined to apply Louisiana's death act under OCSLA on grounds that it was "inconsistent with" federal law, DOHSA. But that begs the question. Section 7 of DOHSA provides that DOHSA does not affect "any State statute giving or regulating rights of action or remedies for death. . . ." 46 U.S.C.A. § 767. Thus, DOHSA and Louisiana's Article 2315 are not inconsistent. In *Gulf Offshore,* the victim had a maritime cause of action against the crew boat, but that did not stop this Court from applying Texas's substantive law on the crew boat on the high seas under OCSLA. There, this Court applied Texas's substantive tort law to the accident on the high seas, necessarily implying that state law applies to platform workers injured on the high seas. Louisiana's death act can be applied under OCSLA alongside general maritime law on the high seas. It necessarily follows that state law is "not inconsistent with" federal law.

Thus, OCSLA provides a separate and alternative basis for applying Louisiana's death act to the instant case.

7. Application of states' death acts on the high seas will help to assure that survivors' real and grave losses will not go uncompensated.

This Court has recognized that loss of society, though not strictly measurable in pecuniary terms, is a very real loss.

> The term "society" embraces a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection. Unquestionably, the deprivation of these benefits by wrongful death is a grave loss to the decedent's dependents.

Sea-Land Serv. v. Gaudet, 414 U.S. 573, 585-86 (1974).

Louisiana, too, recognizes the reality of survivors' grief and loss of love and affection. *Miller v. National Fire & Marine Ins. Co.,* 578 F.2d 125, 128 (5th Cir. 1978).

Under the pretext of uniformity not attainable in this case, the petitioner seeks to have this Court deny compensation for these very real losses to those whose loved ones die on the high seas.

The affected class is large. The class includes the survivors of every decedent who meets wrongful death on the high seas, but who did not contribute to the survivor's financial support.

A prime example of the affected class is retired couples, travelling on cruise ships on the high seas, or on airplanes over the high seas. In their golden years, one of their dearest enjoyments is one another's society, love and affection. Financial support is often no longer important since, by hypothesis, they are no longer employed. If the petitioner prevails, the survivor of a retired spouse who meets wrongful death on the high seas recovers nothing. Not pecuniary loss, because there is none. Not loss of society, love or affection because Section 2 of DOHSA supposedly allows only pecuniary loss. So for a survivor's gravest loss, the society, love and affection of a spouse, the petitioner would allow nothing.

Major children of parents who no longer support them and who meet wrongful death on the high seas suffer the loss of their parents' society, love and affection. Parents of unmarried children who do not support their parents and who meet wrongful death on the high seas suffer the

loss of their children's society, love and affection. By hypothesis, these parents and children would have no pecuniary loss. And for their very real and very grave loss of the decedent's society, love and affection, the petitioner would allow nothing.

That should not be. Victims should not be denied compensation for their real and deepest loss. Wrongdoers should not be spared accountability for the real and deep losses that their wrongs cause.

And it need not be. This Court can continue to apply states' death acts on the high seas to assure fuller compensation for these real and deep losses. Several proper vehicles are available to the Court. The Court can allow states' death acts to apply of their own force on the high seas as it did in *The Hamilton*. The Court can apply states' death acts on the high seas through Section 7 of DOHSA. The Court can apply states' death acts on the high seas overlying the Outer Continental Shelf through OCSLA, 43 U.S.C.A. § 1333.

The Court's decision in this case cannot produce uniformity. It can produce fairness.

———o———

CONCLUSION

This Court should affirm the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES HANEMANN
HENDERSON, HANEMANN & MORRIS
300 Lafayette Street
Houma, Louisiana 70360
Telephone: (504) 868-2081
Attorneys for respondent
CORINE ANN SOUDELIER TAYLOR

V. FARLEY SONNIER
DAVIDSON, MEAUX, SONNIER & MCELLIGOTT
A Professional Law Corporation
810 South Buchanan Street
Lafayette, Louisiana 70502
Telephone: (318) 237-1660
Attorneys for respondent
BETH A. TALLENTIRE

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REPLY

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,
v.
CORINE ANN SOUDELIER TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF FOR PETITIONERS

In our opening brief, we made four general points:

1. The character of admiralty as a federal common law jurisdiction strongly militates against enforcement of state law on the high seas when an applicable national admiralty rule already exists. Pet. Br. 9-13.

2. Because it prescribes a national admiralty rule for wrongful death on the high seas, DOHSA has long been understood to preclude the borrowing of

supplemental rules of recovery from either state law or general maritime law. Pet. Br. 13-19.

3. Section 7 of DOHSA does not affirmatively require admiralty courts to apply state wrongful death statutes on the high seas. Pet. Br. 19-27.

4. Application of state wrongful death statutes on the high seas would run counter to the constitutional policy of maritime uniformity. Pet. Br. 27-39.

In this reply, we address the respondents' contrary contentions and also their alternative argument that state law applies in this case by virtue of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333.

ARGUMENT

A. The Character Of Admiralty As A Federal Common Law Jurisdiction Strongly Militates Against Enforcement Of State Law On The High Seas When An Applicable National Admiralty Rule Already Exists

The parties agree that admiralty is a federal common law jurisdiction and that, at least on the high seas, state law applies only by federal permission. The respondents express this very well: "[w]here Congress has remained silent, as it did until DOHSA, the [admiralty] courts may choose to make or not to make state law the maritime rule." Resp. Br. 13.[1]

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[1] Only *amicus* Texas Trial Lawyers Association refuses to acknowledge the character of admiralty as a federal common law jurisdiction. It argues that state law has independent force and effect on the high seas and therefore must be enforced unless preempted by federal statute. That argument is plainly wrong. This Court often has refused to apply state law in admiralty even in the absence of a controlling federal statute. *See, e.g., Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Roanoke*, 189 U.S. 185 (1903). *See generally* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1032-35 (1967); Note, *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1523-26 (1969).

The respondents' opening discussion is not to the contrary, but a few points warrant mention in the interest of clarification. The respondents make much of the fact that some of the constitutional framers arguably contemplated that federal and state courts would exercise concurrent admiralty jurisdiction. Resp. Br. 7-10. But there is no suggestion in the constitutional debates that the framers also contemplated that the states would be empowered to prescribe various and conflicting substantive rules for governance of the high seas. To the contrary, the framers sought the preservation and development of a single uniform system of admiralty law:

> much of the justification for federal civil jurisdiction in admiralty was the protection of merchants, notably foreign traders, by having a uniform law administered by the federal courts. Hamilton, Madison, Randolph, and Wilson all spoke in terms of the impact on foreigners and the necessity of a uniform system of law. . . . Apparently, their chief object was the convenience of a single system of law . . . .

Stolz, *Pleasure Boating and Admiralty*: Erie *at Sea*, 51 Cal. L. Rev. 661, 670-71 (1963) (footnotes omitted).

The respondents make reference to the "saving to suitors" clause in the Judiciary Act of 1789, now codified at 28 U.S.C. § 1333(1). Resp. Br. 10-11, 26. That clause preserves the jurisdiction of state courts to hear maritime claims, but it does not empower them to prescribe remedies at variance with the federal common law of admiralty. *See, e.g., Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 384 (1918). *See generally*, 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3672 (1985). State law may be applied only to fill the void created by the absence of an applicable "national admiralty rule." *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954). Even then, courts sitting in admiralty may reject state law either in the interest of uniformity or because state law prescribes substantive rules that are inappropriate for the adjudication

of maritime cases. *See* note 1, *supra*. Exercise of concurrent admiralty jurisdiction by federal and state courts does not threaten the integrity of federal common law, moreover, because this Court can act to ensure that the substantive law applied by federal and state admiralty courts remains uniform. *See, e.g., American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980).

The respondents point out that in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74 (1959), the Court observed that the "saving to suitors" clause leaves the states "wide scope" to play a role in the "development of maritime law." Resp. Br. 10, 37. In saying that, however, the Court hastened to add that it was referring only to "'the authority of the States to create rights and liabilities *with respect to conduct within their borders.*'" 358 U.S. at 374-75 n.42, *quoting Just v. Chambers*, 312 U.S. 383, 391 (1941) (emphasis added).[2] The Court made quite clear that state wrongful death statutes, in particular, do not have independent force and effect on the high seas: "Congress was careful to make the Death on the High Seas Act applicable only outside the state territorial waters so as not to intrude on state legislative competence." 358 U.S. at 374-75 n.42.[3]

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[2] The quotation taken from *Just* also observed that

> a State, in the interest of its police power, may establish rules applicable on land and water *within its limits*, even though those rules incidentally affect maritime affairs, provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations."

358 U.S. at 374 n.42, *quoting Just*, 312 U.S. at 389 (emphasis added).

[3] The respondent's quotation from Justice Stewart's dissenting opinion in *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Corp.*, 426 U.S. 407, 435-36 (1976), is somewhat misleading. Although Justice Stewart objected that states are not jurisdictionally incompetent on the high seas, *see* Resp. Br. 7, he acknowledged that the Court often has refused to apply state law on the high seas "when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce." 426 U.S. at 435.

The Court in *Romero* thereby recognized that, even if DOHSA had not been enacted, admiralty courts would not have been under constitutional compulsion to enforce state wrongful death statutes on the high seas. Instead, they could have prescribed a remedy under the general maritime law, as this Court ultimately did in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). Or they could have continued to withhold any remedy for wrongful death, as in *The Harrisburg*, 119 U.S. 199 (1886).

Prior to the enactment of DOHSA, state wrongful death statutes had been applied on the high seas only in proceedings to limit liability, where "the owner [of the vessel] . . . has voluntarily surrendered the remains of his property to an [admiralty] court." S. Rep. No. 216, 66th Cong., 1st Sess. 4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 4 (1920). The chief example is provided by *The Hamilton*, 207 U.S. 398 (1907). There, the Court reasoned that "where Congress has remained silent," 207 U.S. at 404, and "where Congress has not acted," *id.*, the constitutional grant of admiralty jurisdiction to the federal government permits application of state law to torts committed at sea. The Court indicated, however, that the question whether actually to apply state law was for the admiralty courts to decide. *Id.* at 405. The decision to apply state law in that case turned upon the peculiar character of the proceeding: "the statutes of the United States have enabled the owner to transfer its liability to a fund and to the exclusive jurisdiction of the admiralty, and . . . [i]n such circumstances all [valid] claims . . . must be recognized." *Id.* at 406. The respondents therefore understand *The Hamilton*, as do we, as being no more than a case where, in the absence of a national admiralty rule, "this Court did choose to borrow states' death acts selectively as the rule in an admiralty setting." Resp. Br. 13.

The question in this case, of course, is whether state wrongful death statutes will continue to be borrowed and applied following the prescription, in DOHSA, of a uniform national admiralty rule. But even *The Hamilton* recognized that the existence of a federal statute would foreclose application of state law. 207 U.S. at 404. That result follows from the nature of admiralty, especially as respects the high seas, as an inherently federal domain. *See generally* Note, *The Constitutionality of Applying State Wrongful Death Statutes on the High Seas in the Domain of the Death on the High Seas Act (DOHSA)*, 31 Loy. L. Rev. 135 (1985).

B. Because It Prescribes A National Admiralty Rule For Wrongful Death On The High Seas, DOHSA Has Long Been Understood To Preclude The Borrowing Of Supplemental Rules Of Recovery From Either State Law Or General Maritime Law

The respondents acknowledge that, for more than forty years after the enactment of DOHSA in 1920, courts and commentators alike unanimously agreed that DOHSA precludes enforcement of state wrongful death statutes on the high seas. Resp. Br. 20-21.[4]

The respondents make no real effort to address the implications of this Court's decision in *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978). It is apparent, however, that *Higginbotham* narrows and frames the issue here. Reduced to its essentials, *Higginbotham* holds that admiralty courts will not draw upon their federal common law powers in order to supplement or enlarge the remedies prescribed by DOHSA. *See Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981). This poses an obvious dilemma for the respondents. State tort law applies on the high seas only by federal permission, when admiralty courts exercise their common law powers of rulemaking to borrow a rule of decision from state law; yet *Higginbotham* holds that exercise of the common law power of rulemaking will be withheld in view of Congress' enactment of a national admiralty rule.

[4] The respondents incorrectly suggest that a study published in 1969 by the American Law Institute recommended that state law should be applied on the high seas notwithstanding DOHSA. Resp. Br. 22. The study concluded that suits under DOHSA should be maintainable in state courts, but it made clear that such concurrent judicial jurisdiction would "not affect the rule that when actions within the admiralty and maritime jurisdiction are brought in a state court, state law must yield to the needs of a uniform federal maritime law." American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 239 (1969).

The respondents meet this dilemma with main force. They contend that section 7 of DOHSA constitutes a legislative directive to enforce state law: "Congress . . . 'selectively borrow[ed]' state law . . . and the courts must now honor Congress' selection." Resp. Br. 14. The respondents' contention that section 7 makes application of state law mandatory defines the core issue in this case.

C. Section 7 Of DOHSA Does Not Command Admiralty Courts To Apply State Wrongful Death Statutes On The High Seas

Throughout the lengthy legislative process culminating in the enactment of DOHSA, it always had been intended that the new uniform federal remedy would be exclusive on the high seas. *See* S. Rep. No. 216, *supra*; H. R. Rep. No. 674, *supra*.[5] In arguing that section 7 countermands

[5] The respondents claim that earlier bills failed because they would have "preempt[ed] states' death acts on the high seas." Resp. Br. 16. That is wrong. Earlier bills failed because they denied effect to state law within territorial waters; the agitation for a federal statute derived precisely from widespread dissatisfaction with the application of state law on the high seas. *See Wilson v. Transocean Airlines*, 121 F. Supp. 85, 88-89 (N.D. Cal. 1954).

Amicus Association of Trial Lawyers of America ("ATLA") purports to quote Representative Igoe as saying that DOHSA "was never intended to be the exclusive remedy for deaths occurring on the high seas where the contiguous state has an applicable wrongful death act." ATLA Br. 21-22. Neither Representative Igoe nor any other member of Congress made that statement or anything re-

that intent and actually mandates the application of state law on the high seas, the respondents put more weight on section 7 than it can carry. Section 7 merely states that "[t]he provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." As the Solicitor General has noted, "[i]nterpreted according to its plain terms, Section 7 appears simply to state the unremarkable proposition that the DOHSA shall not alter the general content of state wrongful death statutes. It does not expressly address the maritime application of state statutes." U.S. Br. 17-18.

The respondents plausibly observe that, in its original form, the language of section 7 itself might have prohibited, by "negative implication," the application of state wrongful death statutes on the high seas. Resp. Br. 18. If so, by adopting Representative Mann's amendment the House did no more than remove a negatively implied prohibition from one provision of the bill; the House did not express a clear intention to retreat from the stated legislative purposes of uniformity and exclusivity, and it certainly did not issue a directive to apply state law. If the resulting text of section 7 itself, read in isolation from the statute as a whole, does not prohibit enforcement of state law on the high seas, neither does it command such enforcement.

Nor does the floor debate on Representative Mann's amendment reveal an intention affirmatively to require enforcement of state wrongful death statutes on the high

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motely resembling it. In fact, at the page of the *Congressional Record* that ATLA cites, Representative Igoe stated:

> The law is to remain as it is now, where there is a cause of action given by any State law or the decisions of the courts of those States for accidents in waters that are subject to the jurisdiction of those States. *And then beyond that the State law does not apply, but this cause of action does apply.*

59 Cong. Rec. 4483 (Mar. 17, 1920) (emphasis added).

seas. That debate, as everyone concedes, "reflects considerable confusion." Pet. App. 9a. At least two and arguably three separate themes were intertwined. First, there was Representative Mann's concern about the application of state law in territorial waters more than one marine league from shore. Pet. Br. 23-24. Next, there was his desire to ensure that actions under DOHSA could be brought in state courts as well as federal courts. U.S. Br. 23-24 & n. 26. Then, arguably, there was his hope that state law might be applied on the high seas. The latter, of course, is what the respondents stress, Resp. Br. 18-19, but they neglect to note that the only time Representative Mann appeared to express such a hope he immediately corrected himself, explaining that he was referring only to the preservation of state court jurisdiction: "In other words, . . . [the claimant] could sue in a State court and not be required to bring suit in the Federal court." 59 Cong. Rec. 4484 (Mar. 17, 1920). At other times during the debate, Representative Mann was equivocal and ambiguous concerning the effect his amendment would have on the applicability of state law on the high seas. *See* U.S. Br. 24-25 & n.29.

It is apparent that the House members participating in the debate were aware both of *The Hamilton*, which had applied state law only because Congress had not yet supplied a national admiralty rule, and also of the more recent decisions in *Chelentis* and *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which stressed the dominant federal interest in maritime uniformity. Those decisions supported the view, stated by several members during the debate, that DOHSA's prescription of a uniform federal rule for the high seas would exclude reference to state law whether or not section 7 was amended in the manner that Representative Mann proposed. *See* Pet. Br. 26; U.S. Br. 25.[6] Especially in light of *Jensen* and *Chelentis*,

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[6] The respondents continue to suggest that that "reprobated view" was "condemned as 'erroneous'" in *Moragne*. Resp. Br. 31; *see also* Br. in Opp. 9. We have already addressed this point: "the

if Congress had intended affirmatively to require enforcement of state law on the high seas—a requirement that, in the legal climate of the day, presumably would have been held invalid, *see Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920)—it would have taken care to make that requirement explicit. But it did not do so.

In contrast, section 4 of DOHSA illustrates that when Congress did intend affirmatively to require admiralty courts to apply some other body of law, it said so explicitly and unequivocally. Section 4 expressly commands admiralty courts to enforce foreign wrongful death statutes:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas,

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view labelled 'erroneous' in *Moragne* was the belief that state courts may not assert jurisdiction over cases arising under federal maritime law, *see* 398 U.S. at 400 n.14—a matter that has nothing to do with this case." Pet. Reply Mem. 2.

The view actually stated by several members of the House—that enactment of a national admiralty rule necessarily would preclude application of state law on the high seas—if anything may have been too conservative given the temper of the times. It is by no means clear that *The Hamilton* would have survived *Jensen* and *Chelentis* even if DOSHA had not been enacted:

> After the Jensen decision, the Supreme Court reaffirmed the power of the states to give a right of action for deaths occurring on their *territorial waters*, stating that such legislation was within the "maritime but local" exception to the Jensen rule. . . . But since it would be difficult to bring a state-created right of action for death on the *high seas* within this exception, it is doubtful that the Supreme Court would now sanction the application of state death statutes to deaths on the high seas.

Wilson v. Transocean Airlines, 121 F. Supp. at 91 (emphasis in original). If *The Hamilton* had stood generally for the proposition that state wrongful death statutes apply on the high seas, and if it had remained good law after *Jensen* and *Chelentis*, there would have been no need for the recognition of a "maritime but local" exception in later wrongful death cases.

> such right may be maintained in an appropriate action in admiralty in the courts of the United States . . . .

If Congress had harbored a similar intention with respect to state wrongful death statutes, either section 4 would have spoken in terms of "the law of any *State or* foreign State" or section 7 would have specified that any right given by state law for "death occurring upon the high seas . . . may be maintained in an appropriate action in admiralty." Instead, Congress chose to enact each provision in a form that stopped well short of commanding enforcement of state law.

In summary, Representative Mann's last-minute amendment did not completely override twenty years of legislative effort directed toward establishing a uniform and exclusive remedy for wrongful death on the high seas. It is not clear that the House, in adopting Representative Mann's amendment, was even considering the relationship of state law to the high seas. But it is clear that the resulting text of section 7 falls short of commanding admiralty courts to enforce state wrongful death statutes. If, as the respondents suggest, adoption of the amendment represented a retreat from the original legislative purpose of exclusivity, it was, at most, only a partial retreat to a posture of neutrality—a posture that leaves the proper role of state law on the high seas to be determined by the admiralty courts in accordance with governing principles of federal common law and the longstanding constitutional policy of maritime uniformity.

D. Application Of State Wrongful Death Statutes On The High Seas Would Run Counter To The Constitutional Policy Of Maritime Uniformity

The constitutional policy of maritime uniformity is deeply embedded in admiralty jurisprudence. In *Moragne*, for example, this Court recognized and gave effect to "the constitutionally based principle that federal admir-

alty law should be 'a system of law co-extensive with, and operating uniformly in, the whole country.'" 398 U.S. at 402, *quoting The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875).[7] The principle of uniformity is especially forceful on the high seas, where "the essential features of an exclusive federal jurisdiction are involved." *Just*, 312 U.S. at 392.

The respondents correctly note that the policy of uniformity has not prevented the application of state wrongful death statutes in the absence of a national admiralty rule—on the high seas before the enactment of DOHSA, and in territorial waters before *Moragne*. Resp. Br. 34. But the enactment of DOHSA removed the stated premise—that Congress had not acted—upon which decisions such as *The Hamilton* were based. DOHSA prescribes a national admiralty rule of recovery for wrongful death on the high seas; this uniform federal rule has occupied the field, rendering it unnecessary and improper to enforce state rules of recovery as well. The essence of the constitutional policy of maritime uniformity is that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Romero*, 358 U.S. at 373.

The respondents point out that history and Congress have made perfect maritime uniformity unachievable. Resp.

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[7] As is demonstrated by the quotation from *The Lottawanna*—and, indeed, by the statements of the constitutional framers themselves, *see* page 3, *supra*—recognition of the constitutional policy of maritime uniformity long antedated this Court's decisions in *Jensen* and *Chelentis*. The respondents and *amicus* Texas Trial Lawyers Association observe that *Jensen* itself has been criticized. Resp. Br. 26-27; Texas Br. 14. But that criticism, as *Moragne* illustrates, does not go to the underlying principle of uniformity. *See also Hess v. United States*, 361 U.S. 314, 324-25 n.3 (1960) (Harlan, J., dissenting) ("while the results in *Jensen* and some of its progeny have been widely criticized, there is general recognition of the validity of its premise").

Br. 35. This Court recognized as much in *Higginbotham*: together, *Moragne* and DOHSA result in the application of "one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." 436 U.S. at 624 n.18. But this consideration hardly gives carte blanche for the application of state law on the high seas. Although there are slightly different national rules for the territorial waters and the high seas, there is uniformity on the high seas themselves; extension of the various and conflicting laws of the several states onto the high seas obviously would destroy that uniformity.

The respondents contend that because Congress chose, in OCSLA, to apply state law to accidents occurring on offshore platforms, this Court also should apply state law on the high seas. Resp. Br. 35-36. That is a transparent non sequitur. This Court "has specifically held that drilling platforms are not within the admiralty jurisdiction." *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352, 360 (1969). Such platforms are "islands, albeit artificial ones." *Id. See also id.* at 361 ("these structures [are] to be treated as islands or as federal enclaves within a landlocked State"). An attempt to make maritime law uniform with the law applicable on platforms, or islands, or the mainland, would result in the destruction of admiralty as a separate legal jurisdiction altogether.[8]

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[8] The respondents in effect are asking the Court to abandon maritime uniformity in favor of platform-worker uniformity. That truly would be to allow the tail to wag the dog. Admiralty is a geographically delimited jurisdiction, *see Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971), and it is commonplace for workers and others to move into and out of that jurisdiction several times even during the course of a single day. *Cf. Herb's Welding, Inc. v. Gray*, 105 S. Ct. 1421, 1429 & n.13 (1985). The jurisdictional line may be finely drawn, but one who moves across that line does not carry his own law with him. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) (injury to visitor at a vessel berthed at a pier in New York is governed by maritime law, not New York law).

The respondents also are wrong in saying that the adoption of state law in admiralty would provide "the same recovery on the high seas as on the fixed platforms." Resp. Br. 36. Under OCSLA, a state's law governs only those "artificial islands and fixed structures . . . which would be within the area of the State if its boundaries were extended seaward." 43 U.S.C.A. § 1333(a)(2)(A) (1985 Supp.). In contrast, the respondents apparently urge that wrongful death on the high seas should be governed by the law of the state in which the tortfeasor resided or by "the law of the . . . flag." Resp. Br. 38.[9] Thus, in place of the clear-cut division established by Congress, under which the law of the coastal state governs the offshore platform and DOHSA governs the surrounding high seas, the respondents would substitute an uncertain regime in which the law of some other state or states could be controlling even in the waters immediately around or beneath the platform.

The respondents further err in asserting that "[t]he effect of state law upon maritime uniformity is the same, whether in the state's waters, or on the high seas off the coast of a state." Resp. Br. 28. State wrongful death statutes were recognized in territorial waters, as in *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921), "only because Congress had not legislated on the subject," *Lindgren v. United States*, 281 U.S. 38, 44 (1930), and when application of state law would make no "inroads on a harmonious system." *Romero*, 358 U.S. at 373. In contrast, application of state law on the high seas would destroy the very uniformity that Congress has established. Moreover, the use of state law in territorial waters before *Moragne* at least resulted in the application of a single coherent body of law—that of the coastal state—within an identifiable geographical zone; on a local

[9] "[A]n American ship does not actually fly the flag of any particular state but is part of the merchant marine of the United States." *Wilson v. Transocean Airlines*, 121 F. Supp. at 88.

basis, uniformity was preserved. Applying state law on the high seas does not have even that saving grace.

Choice of law on the high seas would not and could not turn upon mere geography. If state law applied at all, the law of any state could apply at any place, subject to the identity of the parties and other factors that might be deemed relevant to the choice of law. Such a state of affairs obviously would hold great potential for confusion and uncertainty in individual cases. The respondents attempt to brush aside the very difficult questions that may arise relating to choice of law with the observation that only the lower courts need "become mired in minutiae like the identity of proper party beneficiaries." Resp. Br. 38. But if state tort law is to apply on the high seas, ultimately this Court will have to decide upon the choice-of-law rules that will determine the applicable standard of care, measure of damages, defenses, beneficiaries, and statutes of limitation. *See* Pet. Br. 30-33. In view of DOHSA, however, that is, neither necessary nor appropriate:

> The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. . . . The Act does not address every issue of wrongful-death law, . . . but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.

Higginbotham, 436 U.S. at 625.

At bottom, the respondents are asking the Court to jettison the policy of maritime uniformity. Indeed, they unabashedly celebrate the prospect of a renewal of the "tensions and discrepancies" that this Court expressly sought to end in *Moragne*. *Compare* Resp. Br. 39-40 *with Moragne*, 398 U.S. at 401 ("the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts"). Yet, as a recent commen-

tator has observed, "[i]t simply [does] not make sense that the *Moragne* Court would create a general maritime law remedy within the three-mile limit to eliminate the 'confusion' created by the application of state wrongful death statutes, if those same statutes could be applied beyond the three-mile limit." Note, *supra*, 31 Loy. L. Rev. at 154 (footnote omitted).

The respondents nevertheless argue that maritime uniformity should be sacrificed in the interest of obtaining bigger damage awards for plaintiffs. Resp. Br. 46-48. The plea for bigger damage awards, however, already has been heard, considered, and authoritatively rejected not once but twice—first by Congress when it enacted DOHSA and chose to limit recovery to pecuniary injury, and then by this Court when it decided, in *Higginbotham*, that admiralty would respect and abide by that deliberate congressional choice.

E. OCSLA Does Not Make State Law Applicable In This Case

The respondents argue, in the alternative, that OCSLA requires application of state law in all cases involving the death of a platform worker on the high seas. Resp. Br. 42-46. That argument is wrong for two independent reasons. *First*, OSCLA does not cover accidents to platform workers away from the platform. *Second*, even if OCSLA covered platform workers while in transit between the platform and the mainland, under OCSLA state law must give way to DOHSA wherever the latter statute applies.[10]

In arguing that OCSLA covers accidents to platform workers away from the platform, the respondents rely principally upon *Rodrigue* and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). But those cases do not

[10] Of course, this Court may choose not to reach these issues at all. Review may properly be restricted to the questions presented in the petition. *See United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975).

support the respondents. In *Rodrigue*, "two men . . . met their deaths on artificial island drilling rigs." 395 U.S. at 352.[11] The injury in *Gulf Offshore* similarly occurred in connection with work being performed right at the platform.[12]

Nor is there any basis in the statute itself for extending OCSLA to platform workers while in transit between the platform and the mainland. The statute provides that state law attaches to the platform, not to the platform worker: state law is made the law of the United States for "artificial islands and fixed structures," not for events occurring elsewhere that happen to involve platform workers or other persons while merely travelling to or from such islands and structures. In this respect, OCSLA is very different from statutes, such as the Jones Act, 46 U.S.C. § 668, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, the coverage of which depends specifically upon the status of the person injured or killed. If Congress had intended in OCSLA to prescribe a system of rules tailor-made for platform workers, in the same manner as it has done for seamen and longshoremen, it would have followed the models provided by those other statutes.

The Fifth Circuit probably has more experience in applying OCSLA than does any other court. It has explained its understanding of the scope of OCSLA's coverage as follows:

> In reaching the conclusion that DOHSA did not apply, the Court [in *Rodrigue*] repeatedly referred to

[11] One of the men died when the crane on which he was working "collapsed and toppled over onto [a] barge." 395 U.S. at 353. The crane itself, however, had been "mounted on the artificial island." *Id.* *Cf. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

[12] The plaintiff in *Gulf Offshore* was a platform worker who, shortly after being taken aboard a rescue vessel, was injured "while assisting crewmen attempting to evacuate other workers from the platforms in turbulent sea." 453 U.S. at 476. The case had been litigated below on the assumption that OCSLA applied, and this Court did not question that assumption.

> accidents occurring "on" fixed platforms, and, indeed, most cases decided under the *Rodrigue* principle involve an accident which occurred, and an injury which was sustained, "on" the platform. In several cases, however, we have applied OCSLA and, consequently, state law, to incidents in which platform workers who were the victims of torts originating on these artificial islands were not actually injured or killed until they fell, jumped, or were pushed into the surrounding seas. In each of these cases, the injured party was a platform worker and the original impact occurred on the platform.
>
> We have applied OCSLA-dictated state law in only one case in which a platform worker was injured by a tort whose initial impact was not sustained on the platform.

Smith v. Pan Air Corp., 684 F.2d 1102, 1110 (5th Cir. 1982) (footnotes omitted).

The single exception noted in *Smith* was *In re Dearborn Marine Service, Inc.*, 499 F.2d 263 (5th Cir. 1974), *cert. dismissed*, 423 U.S. 886 (1975). There, the victim (Monk) was a platform worker who performed clerical duties on a vessel tied to the platform; he was killed when a fireball originating from an explosion on the platform engulfed the vessel. The court held that the suit brought by Monk's widow against the owner of the platform was governed by OCSLA and therefore by state law:

> [Monk] was aboard the [vessel] for the purpose of performing duties directly related to platform operations, the physical cause of his death was the platform explosion, and his cause of action against the platform defendants is based on negligent performance of platform operations. Under the teaching of *Rodrigue* these factors exemplify a more significant connection with the adjacent state than with admiralty.

499 F.2d at 275. Yet, the court held, OCSLA did not apply to the suit brought by Monk's widow against the vessel's owner (Dearborn):

> Suits by landsmen injured aboard ship in navigable waters have traditionally been within maritime jurisdiction. . . . In the context of Monk versus Dearborn, . . . the interest of admiralty intervenes because the risks to which Monk was exposed by Dearborn, and Dearborn's breaches thereof, were admiralty-related, concerning the duty of the vessel to those aboard her.

Id. at 276.

As these extracts demonstrate, the facts of this case are remote from any in which OCSLA has been found to govern. The original impact did not occur on a platform; the cause of death did not physically originate from the platform; at the time of death the platform workers were not actively engaged in performing duties at the platform; the defendant is not the platform owner or operator; and there is no allegation of negligent performance of platform operations.

But even if OCSLA did reach the facts of this case, Louisiana law would not apply. Under OCSLA, the laws of the adjacent state govern only "[t]o the extent that they are . . . not inconsistent . . . with other Federal laws." 43 U.S.C.A. § 1333(a)(2)(A) (Supp. 1985). In *Rodrigue* this Court, after reviewing the legislative history, determined that this provision meant that DOHSA "would be exclusive [wherever] it applied." 395 U.S. at 359. DOHSA did not apply in *Rodrigue*, because the wrongful act there had not "occurr[ed] on the high seas." *Id.*, *quoting* 46 U.S.C. § 761. Here, however, it is beyond dispute that DOHSA does apply.

The facts here are precisely the same as in *Higginbotham*: the deaths occurred when a helicopter transporting platform workers crashed on the high seas. *See* 436 U.S. at 619. DOHSA applied in *Higginbotham*, and it unquestionably applies here as well. Because DOHSA does apply, and because Louisiana law is inconsistent with DOHSA in several respects, including the crucial one of

remedy, OCSLA does not permit application of Louisiana law to this case.

CONCLUSION

For the reasons stated here and in the opening brief, the judgment below should be reversed insofar as it permits enforcement of state wrongful death statutes on the high seas.

Respectfully submitted,

HOWARD DAIGLE, JR.
PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS
400 Poydras Street
New Orleans, LA 70130
(504) 566-1311

KEITH A. JONES *
J. B. RUHL
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

L. S. CARSEY
ED BLUESTEIN, JR.
FULBRIGHT & JAWORSKI
800 MBank Building
Houston, Texas 77002
(713) 651-5151

* Counsel of Record

AMICUS CURIAE

BRIEF

MOTION FILED
NOV 20 1985

NO. 85-202 (7)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner

v.

BETH A. TALLENTIRE,
Respondent

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner

v.

CORRINE ANN SOUDELIER TAYLOR,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF AND ACCOMPANYING BRIEF

E. D. VICKERY*
GUS A. SCHILL, JR.
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

*Counsel of Record

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

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MOTION

COME NOW your Applicants, Sonat Offshore Drilling, Inc., Global Marine, Inc., Western Oceanic, Inc., Sub Sea International, Inc., Ocean Drilling & Explora-

tion Company, Oceaneering International, Inc., Gulf Oil Corporation, and Chevron Corporation, and move this Court for permission to file their amici curiae brief in support of the positions taken by your Petitioners, Offshore Logistics, Inc. and Air Logistics. Petitioners have given their consent (Exhibit "A") to the filing of the brief, but Respondents have withheld authorization. Therefore, leave must be sought to file the amici curiae brief since only several of the parties as opposed to all parties have consented to the filing. This Court previously granted Applicants' Motion for Leave to file an amici curiae brief with respect to the Petition for Writ of Certiorari.

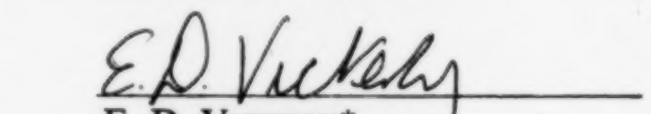
Your Applicants' interest in this matter is that they are drilling companies or offshore lease owners which have both worldwide operations and activities offshore of either Texas or Louisiana, two states which are within the geographical limits of the Court of Appeals for the Fifth Circuit. They are defendants in extensive litigation involving personal injury and/or death actions in not only the court below but other federal courts, and for this reason they have a significant interest in the judicial interpretations which are given to the Death on the High Seas Act (hereafter referred to as DOHSA). Therefore, your Applicants wish for the Court to have their views and reasons in support of a reversal of the opinion below which is not only the first appellate decision to permit non-pecuniary losses to survivors under DOHSA, but it is contrary to decisions from this Court and other United States Courts of Appeal.

Your Applicants have reviewed all briefs which have been filed to date, and they are of the opinion that their perspective as participants in the offshore industry should be

set forth in assisting this Court in determining that monetary remedies which are inconsistent with the explicit provisions of DOHSA cannot be available to a litigant. It will be shown that reliance upon state substantive and remedial rules, as the opinion of the court below mandates, will produce a total lack of uniformity in the application of DOHSA, a result which the Congress intended to circumvent by affirmatively setting forth specific rules relative to the statute of limitations, contributory negligence, the survivors who are entitled to a recovery, and the measure of damages for the survivors.

Your Applicants respectfully move that this Court grant their motion to file the attached brief.

Respectfully submitted,



E. D. VICKERY*
GUS A. SCHILL, JR.
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

Attorneys for Applicants

Of Counsel:

ROYSTON, RAYZOR, VICKERY & WILLIAMS

*Counsel of Record

EXHIBIT "A"

CONSENT TO FILE AMICI CURIAE BRIEF

I am the counsel of record for Offshore Logistics, Inc. and Air Logistics. I consent on behalf of my clients to the filing of the amici curiae brief by Sonat Offshore Drilling, Inc., Global Marine, Inc., Western Oceanic, Inc., Ocean Drilling & Exploration Company, Oceaneering International Inc., Gulf Oil Corporation, Sub Sea International, Inc. and Chevron Corporation.

KEITH A. JONES
Counsel of Record for Petitioners

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BRIEF IN SUPPORT OF THE PROPOSITION THAT STATE REMEDIES WHICH CONFLICT WITH DOHSA ARE INAPPLICABLE

STATEMENT OF INTEREST

Your amici curiae, Sonat Offshore Drilling, Inc., Global Marine, Inc., Western Oceanic, Inc., Sub Sea International, Inc., Ocean Drilling & Exploration Company, Oceaneering International, Inc., Gulf Oil Corporation, and Chevron Corporation, are drilling contractors or offshore lease owners which are involved not only in worldwide operations but also in the waters offshore the various states of this country. They appear for the purpose of supporting the position of the Petitioners, Air Logistics and Offshore Logistics, Inc., that the court below should be reversed because state laws which are inconsistent with an express provision of a Federal maritime statute are inapplicable.

SUMMARY OF ARGUMENT

The court below concluded that the Louisiana statute which gives a recovery for the non-pecuniary items of personal grief of the survivors and loss of society in an action by a decedent's survivors can supplement an action whose sole predicate is the Death on the High Seas Act[1] (hereafter DOHSA). This conclusion was reached notwithstanding the express statutory language which limits a recovery to the litigant's pecuniary losses.[2]

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1. 46 U.S.C. §§ 761, *et seq*. The pertinent statutory provisions are set forth as Exhibit "A."

2. 46 U.S.C. § 762.

The opinion below not only is contrary to previous decisions from the Court of Appeals for the Fifth Circuit,[3] but other federal appellate courts as well.[4] The supplementation of DOHSA with inconsistent state statutes is also contrary to decisions from this Court,[5] and serves to destroy the uniform application of a Federal maritime statute. The language and legislative history of DOHSA cannot be read in support of such a conclusion.

STATEMENT OF FACTS

This litigation arose from a helicopter crash on August 6, 1980, in the Gulf of Mexico more than 3.45 miles from the Louisiana coast. Air Logistics, a Division of Offshore Logistics, Inc., owned and operated the helicopter in question. The casualty resulted in the deaths of James D. Tallentire and Michael Taylor, with the survivors seeking both pecuniary and non-pecuniary recoveries due to the deaths.

Litigation was commenced in the United States District Court for the Eastern District of Louisiana, with the action predicated upon the general maritime law, the

3. Vaz Borralho v. Keydril Co., 696 F.2d 379, 384 fn.6 (5th Cir. 1983); Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437, 438 (5th Cir. 1971); Guess v. Read, 290 F.2d 622, 625 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962).

4. First Circuit: Barbe v. Drummond, 507 F.2d 794, 801 n.10 (1st Cir. 1974); Petition of United States, 418 F.2d 264, 270 fn.4 (1st Cir. 1969); Second Circuit: Middleton v. Luckenbach S.S. Co., 70 F.2d 326, 328-329 (2nd Cir.), *cert. denied*, 293 U.S. 577 (1934); Ninth Circuit: Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 79-81 (9th Cir. 1983). Note also *The Law of Admiralty*, 2d ed., Gilmore and Black (1975), page 364; *Admiralty and Federalism* (1970), Robertson, page 224.

5. Mobil Oil Co. v. Higginbotham, 436 U.S. 618, 625 (1978); Moragne v. States Marine Lines, 398 U.S. 375, 397 (1970); Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917).

Outer Continental Shelf Lands Act (hereafter OCSLA) and DOHSA. The trial court limited the actions to DOHSA because of its earlier ruling that neither the general maritime law nor OCSLA nor state law was applicable. The recoveries on the part of the survivors were restricted to their pecuniary losses based on the express language of DOHSA.

The Court of Appeals for the Fifth Circuit agreed that DOHSA furnished the sole predicate for recovery, but then became the first appellate court to conclude that state law could supplement the pecuniary loss restriction of DOHSA in order to permit the survivors to recover any item of non-pecuniary losses permitted by the law of the adjoining state. In this particular instance, the survivors of Mr. Tallentire and Mr. Taylor were held entitled to claim monetary damages under Louisiana law for loss of society and their personal grief. The last item, while permitted by Louisiana law,[6] is impermissible under the Jones Act,[7] the general maritime law,[8] and the explicit language of DOHSA.

The decision of the Circuit Court below produces this unacceptable anomaly:

1. If the casualty occurs *within* the territorial waters of Louisiana, a survivor *cannot* recover for personal grief under Louisiana law because the federal maritime law is the sole available remedy,

but

6. Matter of S/S HELENA, 529 F.2d 744, 747 (5th Cir. 1976).

7. Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 525-526 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980).

8. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 585 n.17 (1974).

2. If the casualty occurs *outside* the territorial waters of the State of Louisiana, a survivor *can* recover for personal grief under Louisiana law, even though DOHSA and the federal maritime law prohibit recovery of any such non-pecuniary item of damages.

Such a holding is as illogical as it is erroneous.

ARGUMENT

1. Prologue

The inapplicability of a state's non-pecuniary measures of recovery in the context of the DOHSA should be examined in the historical perspectives of both 19th and 20th century decisions and statutes. Once this is accomplished, it will be evident that all state remedies terminate one marine league[9] from the shoreline. The reason for this conclusion is the precise language of DOHSA[10] and the compromise which was effected at the time of its enactment by both houses of Congress.[11]

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9. One marine league is 3.45 miles. For sake of convenience the nautical term will be referred to within this brief as "three miles." *See* United States v. Louisiana, 363 U.S. 1, 9, fn.6 (1960).

10. 46 U.S.C. § 761 provides that DOHSA, with exceptions which are not pertinent to the issue under consideration, is applicable to a casualty occurring beyond a marine league from the shore of any coastal state.

11. A reading of the congressional history indicates that DOHSA was considered on several occasions prior to its enactment in 1920, and one point of contention was whether the statute would be applicable to the inland and coastal waters as well as the high seas. The compromise which was reached was a 3.45 mile distance from the state's shore before DOHSA became applicable. H.R. Rep. No. 674, 66th Cong. 2d Sess. (1920), S. Rep. No. 216, 66th Cong., 1st Sess. (1919), 59 Cong. Rec. 4482, *et seq.* A similar dispute arose and compromise was reached regarding the OCSLA. *See* Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 361-366 (1969).

The various conflicts and tensions which have developed over the past century regarding maritime causes of action for death and the monetary remedies result from the Court's decision in *The Harrisburg*, 119 U.S. 199 (1886), which refused to recognize the survival of a maritime cause of action for death in the instance in which the tortfeasor's conduct resulted in the death of the injured party. The wrongful death actions of the various states were thereafter utilized as a substitute for a general maritime cause of action,[12] but considerable pressure was placed on the Congress for a statute which would provide a remedy for death on navigable waters.

Two statutes were enacted in 1920 with maritime deaths as the subject matter. The Jones Act[13] incorporated the negligence cause of action set forth by the Federal Employers Liability Act,[14] with the statutory protection afforded to seamen and their survivors irrespective of the casualty's geographical location. DOHSA had been before the Congress on several occasions before its passage, and it is clear from the final statutory language that its application was to be limited to those areas of the high seas which were more than three miles from a state's coastline.[15] The purpose of the three-mile zone of statutory inapplicability, in addition to the inland rivers and the Great Lakes, was a compromise which acknowledged a state's statutory or decisional law relative to a maritime but local casualty (within territorial waters of a state) which resulted in death.[16]

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12. Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

13. 46 U.S.C. § 688.

14. 45 U.S.C. § 51.

15. 46 U.S.C. § 761.

16. The maritime but local character is acknowledged in Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921). After an inquiry

The compromise arrangement with respect to death causes of action reached in 1920 remained in effect until 1970. The following rules were controlling during this fifty-year period: (1) state death actions were applicable to non-seamen who met their deaths in state territorial waters;[17] (2) only the Jones Act could be the predicate for liability if a seamen met his death in state territorial waters;[18] (3) DOHSA afforded a warranty of seaworthiness basis for liability and the Jones Act gave a recovery based upon negligence in the instance in which a seaman met his death more than three miles from a state's shore;[19] and (4) DOHSA could be relied upon as a predicate for a cause of action on the theories of negligence and/or unseaworthiness in the event the casualty resulting in death involved a non-seaman on the high seas.[20] The first problem with these rules occurred when the Florida wrongful death statute was held not to recognize the warranty of seaworthiness in a case in which a

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from Congressman Sanders, Congressman Volstead replied as follows: "The language is general. Maritime jurisdiction extends over the rivers and lakes, and unless we inserted this provision, section 1 may extend the admiralty jurisdiction of the United States within the States." H.R. Rep. No. 674, 66th Cong. 2d Sess., 1920, page 4482. Mr. Montague stated with respect to Section 761, "And this section is intended, by inclusion and exclusion, to put that matter at rest, namely, that the territorial waters of the States shall be retained within the jurisdiction and sovereignty of the States and their courts."

17. M/V TUNGUS v. Skovgaard, 358 U.S. 588 (1959).

18. Gillespie v. United States Steel Corp., 379 U.S. 148 (1964).

19. In Re Dearborn Marine Service, Inc., 499 F.2d 263, 270, fn.10 (5th Cir. 1974), cert. dismis'd, sub nom. Monk v. Chambers & Kennedy, 423 U.S. 886 (1975).

20. *Id.* The statute by its own terms covers "neglect." 46 U.S.C. § 761.

longshoreman met his death while working aboard a vessel in the Port of Miami.[21]

When this Court considered this Florida case in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), it sought to terminate the tensions and conflicts between the two maritime statutes and state laws by overruling *The Harrisburg*. In doing so, this Court created a cause of action for wrongful death under the general maritime law. The opinion did not decide the damages recoverable or what survivors were entitled to a recovery, but decided to "await further sifting through the lower courts in future litigation"[22] with both DOHSA and state wrongful death acts being utilized as guidelines.[23]

There was no substantial "sifting" by the lower courts on the issue of recoverable damages to be claimed by a decedent's survivors who instituted an action under the general maritime law, because of this Court's decision in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), a case of first impression in which a schedule of recoverable damages was set forth. It was recognized that neither the Jones Act nor DOHSA permitted a survivor to recover a non-pecuniary loss denominated as loss of society,[24] but this Court held such an item was recoverable

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21. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

22. 398 U.S. at 408.

23. *Id.*

24. 414 U.S. 573, 586 for DOHSA. 414 U.S. at 586, fn.18, cites Michigan C.R. Co. v. Vreeland, 227 U.S. 59, 70 (1913) for the proposition that non-pecuniary losses cannot be recovered under some wrongful death actions. This decision interpreted the F.E.L.A., with the prohibition against non-pecuniary losses being the interpretation of the Jones Act by reference to *Vreeland*. Ivy v. Security Barge Lines, Inc., 606 F.2d 524, 525-526 (5th Cir. 1979), *cert. denied*, 446 U.S. 956 (1980).

for an action pursuant to the *Moragne* general maritime law cause of action.[25] It is at this juncture that a departure from the uniform approach to wrongful death actions on navigable waters occurred.

Two Circuit Courts of Appeal considered the issue of whether the non-pecuniary losses set forth by *Gaudet* in the general maritime law context could supplement the DOHSA cause of action in view of the categorical statutory language that pecuniary losses were the sole measure if the casualty occurred more than three miles from shore. *Barbe v. Drummond,* 507 F.2d 794 (1st Cir. 1974), refused to recognize a judicial expansion of a survivor's DOHSA recovery to include non-pecuniary items, while *Law v. Sea Drilling Corp.,* 510 F.2d 242 (5th Cir.), *aff'd on rehearing* 523 F.2d 793 (1975), reached a contrary conclusion on the theory that DOHSA should follow *The Harrisburg* with "the rest of the hulk to an honorable rest in the briney deep."[26] The decision in *Law* recognized only one theory of recovery to cover casualties on all navigable waters, the general maritime law as fashioned by *Moragne* and *Gaudet.*

Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978) rejected the *Law* concept that the *Gaudet* decision repealed DOHSA, and concluded that non-pecuniary losses as recoverable under the general maritime law of *Gaudet* could not be recovered in the geographical area covered by DOHSA. The rationale of this conclusion was that " . . . we have no authority to substitute our views for those expressed by Congress in a duly enacted statute".[27]

25. 414 U.S. 573, 584-591.

26. 523 F.2d 793, 798 (5th Cir. 1975).

27. 436 U.S. 618, 626 (1978).

The foregoing historical data forms the context for this Court's determination of the basic question in this case:

> Whether the law of an adjoining state can supplement a DOHSA cause of action when such state scheme of monetary losses is inconsistent with the categorical statutory mandate of DOHSA that only pecuniary losses are recoverable.

2. DOHSA Is Applicable to This Litigation

The geographical area recognized by DOHSA pertains to:

> "Whenever the death of a person shall be caused by wrongful act, negligence, or default *occurring on the high seas beyond a marine league from the shore* of any State, . . ., the personal representative of the decedent may maintain a suit for damages in the district court of the United States. . . ."[28] (emphasis supplied)

The facts of the captioned cause meet the geographical situs of the statutory language in that the casualty occurred more than one marine league from the coast of Louisiana. Additionally, this Court and the court below have concluded that the crash of a helicopter or other aircraft on the high seas comes within the protective scope of DOHSA.[29]

28. 46 U.S.C. § 761.

29. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978); Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 271, fn.20 (1972); Smith v. Pan Air Corp., 684 F.2d 1102, 1108-1109 (5th Cir. 1982).

3. OCSLA Is Inapplicable

The OCSLA extends "to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands . . . to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . .".[30] The statute also provides that the civil and criminal laws of each adjacent State would be applicable if they are not inconsistent "with other Federal laws".[31]

The decisions which have applied the OCSLA to casualties on the outer continental shelf have done so on the basis that a fixed structure was involved in the events of the accident. The question before this Court involves the crash of a helicopter into the navigable waters of the Gulf of Mexico at a time in which it was not in close proximity to a fixed structure. The jurisdictional requirements of the OCSLA simply have not been met. *Chevron Oil Company v. Huson,* 404 U.S. 97 (1971); *Rodrigue v. Aetna Casualty & Surety Co* , 395 U.S. 352 (1969).

Even if the matter were one for the OCSLA, the adjoining law of Louisiana would not be applicable as DOHSA is an existing federal law covering such deaths on the high seas. DOHSA provides a recovery of "a fair and just compensation for the *pecuniary* loss sustained by the persons for whose benefit the suit is brought . . ."[32] The Louisiana law permitting recovery of non-pecuniary losses, if borrowed by the OCSLA, could not be applied since Louisiana law is inconsistent with "other

30. 43 U.S.C. § 1333(a)(1).

31. 43 U.S.C. § 1333(2)(A).

32. 46 U.S.C. § 762.

Federal laws."[33] The explicit provisions of the OCSLA support this proposition, as does this Court's statement that a Louisiana statute's applicability to a casualty on a fixed platform would be "subject to the absence of 'inconsistent' and applicable federal law".[34] There is no question but that DOHSA is applicable. Since the Louisiana law which permits recovery of non-pecuniary losses such as loss of consortium and personal grief of the survivors[35] is inconsistent with DOHSA, Louisiana law is inapplicable.

4. DOHSA Limits Recoveries to Pecuniary Losses, and State Law to the Contrary Cannot Be Used as a Supplemental Recovery

The opinion of the court below isolates one sentence in one section of DOHSA[36] to conclude that a state law which is inconsistent with the express provisions of a

33. 43 U.S.C. § 1333(2)(A) provides that the laws of an adjacent state are applicable if not inconsistent with other federal laws. *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) and Continental Oil Co. v. The London Steamship Owners' Mutual Insurance Association, 417 F.2d 1030, 1035-40 (5th Cir. 1969), *cert. denied,* 397 U.S. 911 (1970).

34. Chevron Oil Co. v. Huson, 404 U.S. 97, 103 (1971).

35. Louisiana law permits loss of society. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 587 fn.21 (1974). Louisiana law permits a recovery for the survivor's grief. Matter of S/S HELENA, 529 F.2d 744 (5th Cir. 1976).

36. § 767. Exceptions from operation of chapter.
"The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone." The emphasis is upon the isolated sentence within the isolated section.

federal law should prevail.[37] In reaching this conclusion, the court below recognized that "there has been considerable uncertainty over the effect of this seemingly simple provision,"[38] and concluded that the congressional debate reflected "considerable confusion among the members of Congress concerning the effect" of the single sentence.[39] To reach this result, the court below had to ignore two of its earlier decisions[40] holding DOHSA applicable to casualties occurring more than one marine league from the shore of a state, thereby excluding the application of inconsistent state law. The isolated consideration of a sentence for the purpose of statutory interpretation is contrary to this Court's admonition that:

> "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, 'in expounding a statute, we must not be guided by a single sentence or member

37. This Court in Reed v. SS YAKA, 373 U.S. 410, 414-15 (1963), commented upon the literal reading of a statute in the following manner: "But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, . . ." Still further, the Court stated: "In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute would prompt us to ignore the fact . . ." These quotations demonstrate the erroneous approach of the court below in isolating one sentence within one section of a statute for examination.

38. 754 F.2d at 1279.

39. 754 F.2d at 1279-80.

40. While the opinion refers to Vaz Borralho v. Keydril Co., 696 F.2d 379 (5th Cir. 1983), in fn.4 at page 1278, there is no discussion of earlier decisions from the Court of Appeals for the Fifth Circuit which held that state law is inapplicable in DOHSA jurisdictions. *See* Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437, 438 (5th Cir. 1971); and Guess v. Read, 290 F.2d 622, 625 (5th Cir. 1961), *cert. denied*, 368 U.S. 957 (1962).

> of a sentence, but look to the provisions of the whole law, and to its object and policy'."[41]

The interpretation of the one sentence in Section 7 of DOHSA that state law can supplement the Federal statute even if it contradicts a categorical provision located elsewhere in the statute completely ignores the rationale for a three-mile zone between a state's coast and the commencement of DOHSA's application, as well as the statutory specificity relative to the limitation of losses to those of a pecuniary nature. Such an interpretation not only disregards the statutory history that the purpose of the statute was to create a uniform application of law to deaths which occur on the high seas,[42] but renders meaningless the explicit statutory three-mile boundary and monetary limitation to pecuniary losses.

The common thread which runs through the various maritime statutes and opinions from this Court is one

41. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 285 (1956). *See also* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 177 (1973); and Richards v. U.S., 369 U.S. 1, 11 (1962).

42. "Mr. Volstead. No. If the gentleman will excuse me, my understanding is that the object of the act is to make a uniform rule for everything outside of the 3-mile limit." 59 Cong. Rec. 4482 (1920). "Mr. Montague. No; I beg the gentleman's pardon, it does not. It is intended to exclude a situation of that sort, as the chairman states, by making the law uniform." Mr. Montague also stated, "In reply to the statement of my colleague [Mr. Moore] I will say that the jurisdiction upon the subject is found in the Constitution of the United States, and it has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such law is exclusive." 59 Cong. Rec. 4483. "Mr. Cullen: Then the purpose of that is to make the law uniform? Is that the object of it?" "Mr. Igoe: The law is to remain as it is now, where there is a cause of action given by any State law or the decisions of the courts of those States for accidents in waters that are subject to the jurisdiction of those States. And then beyond that the State law does not apply, but this cause of action does apply." 59 Cong. Rec. 4483.

of a uniform application of a federal maritime law so that state statutes are preempted, as opposed to a variance within the law as a litigant moves from one state jurisdiction to another. This is true of the general maritime law,[43] the Jones Act,[44] the Carriage of Goods by Sea Act,[45] the Maritime Lien Act,[46] and such conclusion was true under DOHSA until the decision from the court below.[47] If the decision below is affirmed, DOHSA would be an exception to the rule that federal maritime law preempts state statutes and decisional law, and the prediction of the concurring opinion below that "this result may create a mess in more than a few cases"[48] would be reality. Indeed, there is no reason to create such a "mess" in view of DOHSA's legislative history and its interpretation by this Court.

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43. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 382 (1918).

44. McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 225 (1958).

45. Mitsui & Co., Ltd. v. America Export Lines, Inc., 636 F.2d 807, 815 (2nd Cir. 1981); J. B. Effenson Co. v. Three Bays Corp., 238 F.2d 611 (5th Cir. 1956).

46. Kane v. M/V LEDA, 491 F.2d 899, 900 (5th Cir.), *cert. denied,* 419 U.S. 865 (1974).

47. Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77, 79-81 (9th Cir. 1983); Vaz Borralho v. Keydril Co., 696 F.2d 379, 384 fn.6 (5th Cir. 1983); Lockwood v. Astronautics Flying Club, Inc., 437 F.2d 437, 438 (5th Cir. 1971); Petition of United States, 418 F.2d 264, 270 fn.4 (1st Cir. 1969); Middleton v. Luckenbach Steamship Co., 70 F.2d 326, 328-329 (2nd Cir.), *cert. denied,* 293 U.S. 577 (1934).

48. 754 F.2d at 1289. The dissent added, "Under the majority's opinion, state law is preempted by general maritime law on territorial waters, but operative on the high seas. The result is 'as damaging to uniformity in wrongful death actions as it is illogical'." 754 F.2d at 1289.

In Section III of its opinion in *Moragne v. States Marine Lines,* 398 U.S. 375 (1970), this Court discussed the legislative history of DOHSA and its relationship with state law. The Court set forth the legislative history of the statute:

> "The Act (DOHSA) would accomplish that result 'for deaths on the high seas, leaving unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States. . . . This is for the purpose of uniformity, as the States cannot properly legislate for the high seas.' S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess., 3, 4 (1920)."[49] (Parenthetical expression added)

In rejecting the vessel owner's claim that DOHSA specifically authorized the application of state laws within the territorial waters, the Court gave the following answer:

> "There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of maritime law by ceding that function exclusively to the States. However, respondents argue that an intent to do just that is manifested by portions of the Death on the High Seas Act quoted above (Section 767)."[50] (Parenthetical expression supplied)

The Court explicated this point further by stating:

> "The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit

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49. 398 U.S. at 397.

50. 398 U.S. at 396.

> because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed."[51]

In fact, *Moragne* formulated a general maritime law rule for casualties occurring within state territorial waters in order to "assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."[52] The opinion below destroys the very uniformity this Court established for navigable waters within the territorial boundaries of the states by injecting the same "tensions and discrepancies" into the DOHSA jurisdiction.

The significant portion of Congressional history supports the proposition which has been set forth in the two preceding paragraphs.[53] The recorded debate is limited to the deliberations of the House of Representatives, and it is found at 59 Cong. Rec. 4482, *et seq*. The debate indicates that the purpose of the DOHSA three-mile rule was to apply a uniform rule to accidents occurring on the high seas,[54] with the confusion in the course of the debate being set by Congressman Mann's amendment to Section 767 for the purpose of having the initial sentence

51. 398 U.S. at 398.

52. 398 U.S. at 401.

53. The Senate Report is set forth at S. Rep. No. 216, 66th Cong., 1st Sess. (1919); and the House Report is found at H.R. Rep. No. 674, 66th Cong., 2d Sess. (1920).

54. *Supra,* at 38.

read "[t]he provision of any state statute giving or regulating rights of action for death shall not be affected by this chapter."[55] Congressman Goodykoontz recognized that the sentence was incomplete with the remaining language of the section having no reference to anything in particular.[56] The debate apparently was concerned with whether the state and federal courts would have concurrent jurisdiction as opposed to extending state law beyond the three-mile limit, but as the court below recognized clarity is not the hallmark of this Congressional discussion.[57] Neither the Congressional history nor the statute

55. Mr. Mann explained the reason for his amendment in the following manner: "Mr. Mann of Illinois. Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away jurisdiction which can now be exercised by any State court. I may be wrong about that. I notice in the report in one place, on page 2, this statement from somebody: We are very anxious to have the bill go through in its present simple form, which avoids conflict with State statutes and yet remedies a crying defect in the maritime law as administered in this country—and so forth. If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court." 59 Cong. Rec. 4484 (1920). The opinion below emphasized the next to last sentence, but in giving the emphasis failed to recognize the caveat of the last sentence "in other words" to demonstrate that the substance of the discussion related to state court jurisdiction as opposed to state substantive law.

56. 59 Cong. Rec. 4485-86 (1920).

57. "The debate at the time reflects considerable confusion among the members of Congress concerning the effect of the Amendment, a confusion which is reflected over the next sixty years in the conflicting decisions of federal courts interpreting section 7." 754 F.2d at 1279-80.

contain language which demonstrates that a state law which is contrary to an explicit provision of DOHSA should preempt the federal law in whole or in part.

The opinion below also conflicts with *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618 (1978), for reasons which were not discussed by the court below. In *Higginbotham,* this Court recognized that

> "The Death on the High Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival *and damages.*"[58] (Emphasis supplied)

The Court then concludes

> "In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries."[59]

Acceptance of state statutes which contradict the specific terms of DOHSA in the field of monetary damages is contrary to the rule of *Higginbotham,* is destructive of a uniform approach to maritime casualties (as mandated by *Moragne*) which occur outside state territorial waters, and leads to additional anomalies which need to be considered.

Two examples of additional tensions between state laws and DOHSA demonstrate the "tensions and dis-

58. 436 U.S. at 625. *See also The Law of Admiralty,* 2nd ed., Gilmore and Black (1975), at page 364 which states: "The enactment of DOHSA in 1920 apparently rendered obsolete the Supreme Court's suggestion in *The Hamilton* that state wrongful death statutes could be applied to deaths on the high seas."

59. 436 U.S. at 625.

crepancies" which result from the decision below insofar as litigation by the survivors is concerned. Reference is made to DOHSA's three-year statute of limitations[60] and the provision that contributory negligence will not act as an automatic bar to recovery but rather is a factor in mitigation of the loss.[61] The three coastal states which comprise the Court of Appeals for the Fifth Circuit, Texas, Louisiana and Mississippi, have limitation periods which differ not only from DOHSA but from each other. Texas has a two-year limitation period,[62] while the period for Louisiana is one year[63] and for Mississippi is six years.[64] Is the DOHSA three-year limitation provision to be subordinate to a lesser or greater period of time based on the fortuitous circumstance of the state which is adjacent to the maritime casualty?

The chaos and uncertainty is compounded by reference to the Texas rule relative to the plaintiff's negligence and the conduct of joint tortfeasors. Under DOHSA the doctrine of true comparative negligence applies.[65] Thus any contributory negligence of a decedent would serve to reduce the amount of damages recovered by the percentage of his fault. Additionally, if two or more tortfeasors were found liable for his death, each would be jointly and severally liable for Plaintiff's total recovery.

60. 46 U.S.C. § 763 originally provided for a two year statute of limitations; however, the period was increased to three years. Pub. L. 96-382 § 1, Oct. 6, 1980, 94 Stat. 1525.

61. 46 U.S.C. § 766. *See* legislative history at 59 Cong. Rec. 4482 (1920).

62. Article 5526 of Vernon's Texas Annotated Civil Statutes.

63. La. Rev. Civil Code, Article 3536.

64. Section 15-1-49, 5 Miss. Code (1972).

65. *Supra,* footnote 56.

If both were solvent and able to pay, each Defendant would bear the damages based on the percentage of its fault in causing the injury. Under Texas law, however, there can be no recovery by the survivors in the event the decedent's negligence exceeds 51%.[66] Additionally, under Texas law in a joint tortfeasor situation, if the percentage of negligence of one tortfeasor is less than the percentage of negligence found on the decedent, that tortfeasor is not jointly and severally liable for the total damages if the other tortfeasor is insolvent, but is liable only for those damages attributable to its own percentage of fault.[67]

It was precisely to prevent such conflicts as the foregoing within the territorial waters of the states that *Moragne* held such state wrongful death statutes inapplicable and preempted by the general maritime law cause of action for wrongful death created in *Moragne*.

Multiply the problems exemplified by the various rules of the coastal states for statutes of limitations, contributory fault, and the joint tortfeasor which must respond

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66. Section 1 of Article 2212a of Vernon's Texas Annotated Civil Statutes.

67. Section 2(c) of Article 2212a of Vernon's Texas Annotated Civil Statutes.

Assume Plaintiff is found to be 10% at fault, Defendant A is 85% at fault and Defendant B is 5% at fault with damages found to be $100,000.00. Defendant A is bankrupt. Under DOHSA and the general maritime law Plaintiff collects $90,000.00 from Defendant B, who is jointly liable, but under Texas law Plaintiff collects only $5,000.00 from Defendant B who has no joint liability under Article 2212a, Section 2(c) of the Texas statute which provides: "Each defendant is jointly and severally liable for the entire amount of the judgment awarded the claimant, except that a defendant whose negligence is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of negligence attributable to him."

to the judgment, and it becomes obvious that unless there is a uniform application of all the rules set forth under DOHSA the result will be a welter of conflicts and confusion. It is obvious that the Congress did not intend for these inconsistent results to occur because its primary purpose in passing DOHSA was to provide uniformity by setting forth specific rules to cover actions for wrongful deaths which occur on the high seas.

CONCLUSION

Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917), held that state legislation involving maritime matters could not be valid if it:

(1) contravenes the essential purpose expressed by an act of Congress, *or*

(2) works material prejudice to the characteristic features of the general maritime law, *or*

(3) interferes with the proper harmony and uniformity of that law.

The opinion below attempts to make such legislation applicable to deaths on the high seas when such state legislation cannot meet the test of any one of the three *Jensen* criteria because:

(1) It contravenes the Congressional purpose to provide a uniform remedy for deaths on the high seas.

(2) It works material prejudice to the basic characteristic features of the general maritime law relating to monetary damages, contributory negligence and joint tortfeasor liability.

(3) It destroys the proper harmony and uniformity of the general maritime law by (a) applying different rules depending on whether the death occurs within or without the territorial waters of the adjoining states, and (b) by making different rules apply depending on what state is adjacent to the high seas on which the death occurs.

It is respectfully submitted that the decision below should be reversed, and the 50 year tradition which accepts the uniform application of DOHSA should be restored.

Respectfully submitted,

E. D. Vickery

E. D. VICKERY
GUS A. SCHILL, JR.
ROYSTON, RAYZOR, VICKERY
& WILLIAMS
2200 Texas Commerce Tower
Houston, Texas 77002
713/224-8380

CERTIFICATE OF SERVICE

I certify that on this 14th day of November, 1985, three true and correct copies of the foregoing motion and brief were mailed to the following: Mr. Howard Daigle, Jr., Phelps, Dunbar, Marks, Claverie & Sims, 400 Poydras Street, New Orleans, Louisiana 70130; Mr. Keith A. Jones, Fulbright & Jaworski, 1150 Connecticut Avenue, N.W., Washington, D.C. 20036; Mr. V. Farley Sonnier, Davidson, Meaux, Sonnier & McElligott, P. O. Drawer 2908, Lafayette, Louisiana 70502; and to Mr. Charles Hanemann, Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana 70360.

E. D. Vickery

OF ROYSTON, RAYZOR, VICKERY
& WILLIAMS

APPENDIX "A"

CHAPTER 21—DEATH ON HIGH SEAS BY WRONGFUL ACT

46 U.S.C.

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 763. Limitations

Suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

§ 765. Death of plaintiff pending action

If a person die[1] as the result of such wrongful act, neglect, or default as is mentioned in section 761 of this title during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this chapter for the recovery of the compensation provided in section 762 of this title.

1. So in original. Probably should read "dies".

§ 766. Contributory negligence

In suits under this chapter the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

§ 767. Exceptions from operation of chapter

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

AMICUS CURIAE

BRIEF

MOTION FILED
NOV 21 1985

NO. 85-202 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

BETH A. TALLENTIRE,
Respondent.

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORRINE ANN SOUDELIER TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF KENNETH G. ENGERRAND FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN SUPPORT OF THE POSITION OF PETITIONERS

KENNETH G. ENGERRAND
Suite 500, Dresser Tower
601 Jefferson Street
Houston, Texas 77002
(713) 659-4816

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

BEST AVAILABLE COPY

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Applicant, Kenneth G. Engerrand, respectfully moves this Honorable Court for leave to file an amicus curiae brief in support of the position of Petitioners, Offshore Logistics, Inc. and Air Logistics. Consent has not been

received from Respondents, and leave to file must be sought.

Applicant is an adjunct professor of admiralty and maritime law at South Texas College of Law in Houston, Texas. Applicant has taught various courses in admiralty and maritime law for the past eight years and has written articles in the area of maritime personal injury law. Applicant also publishes the works of maritime practitioners and students in his capacity as faculty adviser to the Special Maritime Editions of the South Texas Law Journal.

Applicant has exhaustively researched the legislative history of all of the maritime statutes relating to wrongful death and personal injury in connection with the following articles: Engerrand & Brann, *Troubled Waters For Seamen's Wrongful Death Actions,* 12 J. MAR. L. & COM. 327 (1981); Engerrand & Rogers, *The Continuing Conflict Between Congress and the Supreme Court over the Standard of Care in Longshore Third Party Cases,* 22 S. TEX. L.J. 423 (1981); Engerrand & Bale, *Seaman Status Reconsidered,* 24 S. TEX. L.J. 431 (1983). This research includes compiling the complete legislative history of the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1982) from the date of this Honorable Court's decision in *The Harrisburg,* 119 U.S. 199 (1886), until the passage of the Act in 1920.

The decision of the court of appeals in the case at bar is based largely on that court's interpretation of the legislative history of the Death on the High Seas Act. The court of appeals focused on three pages from the Congressional Record out of a history of more than thirty years of legislative effort. Applicant respectfully moves this Honorable Court for leave to file an amicus curiae brief

which will set out the entire legislative history of the Death on the High Seas Act, which Applicant believes is necessary for an understanding of the issue presented in this case.

Applicant has no affiliation with any of the parties or counsel in this case.

WHEREFORE, Applicant respectfully moves for leave to file an amicus curiae brief in the captioned cause.

Dated: November 21, 1985

Respectfully submitted,

KENNETH G. ENGERRAND
Suite 500, Dresser Tower
601 Jefferson Street
Houston, Texas 77002
(713) 659-4816

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BRIEF IN SUPPORT OF THE POSITION OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is stated in the Motion for Leave to File Amicus Curiae Brief.

SUMMARY OF ARGUMENT

The Death on the High Seas Act was passed only after twenty-three bills were introduced in Congress over a period of thirty-two years. Hearings were held, Committee Reports were drafted and debates were conducted in Congress. The drafters and supporters of the Statute expressed their purpose of filling the void on the high seas where states cannot properly legislate. It was their view that when Congress legislates in an area, it supersedes any authority of the states to supplement its provisions. Thus, the drafters of the Death on the High Seas Act included language in the Act intended to preserve state wrongful death remedies within the area not covered by the federal Statute—state territorial waters.

The amendment to Section 7 of the Act which deleted the reference to the location of the waters in which state remedies were to be preserved was not sufficient to alter the view of the Statute's authors and supporters that the federal law was to be the uniform remedy on the high seas. Taking three pages of debate out of the entire history and context leading to the passage of the Death on the High Seas Act fails to give a true reading to Congressional intent and writes an anomaly into the maritime law which is inconsistent with the pronouncements of this Honorable Court.

ARGUMENT

The admiralty and maritime law of the United States is ruled by two sovereigns, Congress and the United States

Supreme Court. This dual sovereignty has created no greater confusion than in the area of maritime personal injury and death remedies.[1]

The decision of this Honorable Court in *The Harrisburg*, 119 U.S. 199 (1886)[2] led to a "torrent of difficult litigation,"[3] in the courts and a persistent assault on Congress which did not end until the Death on the High Seas Act[4] was enacted and *The Harrisburg* was overruled.[5]

In 1888 Senator McPherson introduced the first bill aimed at overruling *The Harrisburg*.[6] His proposal sought

1. *See generally* Engerrand & Brann, *Troubled Waters for Seamen's Wrongful Death Actions*, 12 J. MAR. L. & COM. 327 (1981); Engerrand & Rogers, *The Continuing Conflict Between Congress and the Supreme Court over the Standard of Care in Longshore Third Party Cases*, 22 S. TEX. L.J. 423 (1981); *see also* 52 CONG. REC. 1066 (1915) (statement of Rep. Webb): "That is the most difficult maze of legislation that a man can walk into."

2. This Court held that no wrongful death action exists in the courts of the United States under the general maritime law. *The Harrisburg*, 119 U.S. at 213.

3. *Moragne v. States Marine Lines*, 398 U.S. 375, 408 (1970).

4. 46 U.S.C. §§ 761-768 (1982).

5. *Moragne*, 398 U.S. at 409. *Moragne* has begun a new torrent of litigation as manifested by the opinion of the court of appeals in the case at bar.

6. S. 3295, 50th Cong., 1st Sess. (1888). The provisions of this bill are as follows:

> That subdivision eighth, section five hundred and sixty-three, chapter three, title thirteen, of the Revised Statutes of the United States be amended so as to read as follows, viz:
>
> Eighth. Of all civil causes of admiralty and maritime jurisdiction, which shall be held to include suits in rem against a vessel or in personam against her owners for damages for loss of life caused by torts committed on the high seas or the lakes or other navigable waters of the United States, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it, and of all seizures on land or on water not within admiralty and maritime jurisdiction; and such jurisdiction shall be exclusive except in the particular cases where jurisdiction of such causes and seizures is given to the

to amend the basic grant of admiralty jurisdiction to the federal courts[7] "to include suits in rem against a vessel or in personam against her owners for damages for loss of life caused by torts committed on the high seas or the lakes or other navigable waters of the United States."[8] No action was taken after the bill was referred to the Committee on Commerce.[9]

It was not until 1900 that the next legislative attempt was made to create a maritime wrongful death remedy. This originated with the formation of the Maritime Law Association of the United States in 1899. One of the first activities of the MLA was to draft a statute dealing with the absence of a maritime wrongful death remedy.[10] Congressman Boutell introduced a draft in 1900[11] which

> circuit courts, and shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.
>
> SEC. 2. This act shall take effect immediately.

7. The grant of admiralty jurisdiction to the federal courts is codified in 28 U.S.C. § 1333 (1982).

8. S. 3295, 50th Cong., 1st Sess. (1888).

9. 19 CONG. REC. 6013, 50th Cong., 1st Sess. (1888).

10. H.R. REP. No. 160, 63d Cong., 2d Sess. 5 (1913).

11. H.R. 9197, 56th Cong., 1st Sess. (1900); *see* 33 CONG. REC. 2611 (1900). The provisions of this bill are as follows:

> That whenever the death of a person, or an injury to any person, shall be caused by the wrongful act, neglect, or default of any ship or navigation company, corporation, individual, or individuals carrying passengers between the several ports of the United States, or between the ports of the United States and foreign countries, either upon the high seas, or in foreign waters, or the Great Lakes, or whether in foreign or domestic vessels, or caused by or through the wrongful acts, neglect, or default of the servants, officers, or crews of such carrying vessels, actions for damages shall be against such ship or navigation company, corporation, individual, or individuals owning or navigating such vessels, in the courts of the United States, where service can be had on such offending ship or navigation company, corporation, individual, or individuals, under the laws prevailing where suits may be brought, and such suits may be in rem or in personam.

granted a federal remedy for death or injury against the owner or operator of any foreign or domestic vessel carrying passengers between United States ports or between the ports of the United States and foreign countries, whether on the high seas, in foreign waters or on the Great Lakes.[12] Congressman Boutell's bill was "imperfect in many particulars, and was afterwards withdrawn."[13]

From 1900 to 1903 the MLA debated the coverage of the proposed wrongful death statute. "The main issue was, whether to make such an act apply to all navigable waters, and thus supersede state statutes within their respective boundaries, or to make it supplementary to state statutes and apply only on waters not covered by any statute."[14] The debate was finally resolved in favor of a uniform maritime remedy.

Between 1904 and 1911 the MLA draft bill was introduced eight times in the Senate and House of Representatives.[15] The draft proposed a wrongful death remedy

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SEC. 2. That whenever the death of a person shall be caused by the wrongful acts, neglect, or default set forth in the first section of this Act, an action therefor shall survive and shall be brought by and in the names of the personal representatives of such deceased persons for the benefit of the next of kin of such deceased person, and either party to such actions shall be entitled to a jury as in suits at common law.

SEC. 3. That the United States district courts in admiralty and the circuit courts of the United States in actions on the case shall have jurisdiction in all such suits, and all actions for such deaths or injuries contemplated by this Act shall be instituted within five years from the time the actions accrued.

12. *Id.*

13. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 117 (1921).

14. *Id.*

15. H.R. 9880, 58th Cong., 2d Sess. (1904); S. 5564, 58th Cong., 2d Sess. (1904); H.R. 11486, 59th Cong., 1st Sess. (1906); H.R. 25807, 60th Cong., 2d Sess. (1909); S. 8397, 60th Cong., 2d Sess. (1909); H.R. 15810, 61st Cong., 2d Sess. (1909); S. 6291, 61st Cong., 2d Sess. (1910); S. 2673, 62d Cong., 1st Sess. (1911); *see*

for the high seas, Great Lakes or any navigable waters of the United States; or if on a United States vessel, in

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also S. 1663, 63d Cong., 1st Sess. (1913). The provisions of these bills are as follows:

That whenever an action, whether in rem or in personam, might have been maintained by any injured party, had death not occurred, to recover damages for personal injury happening to such person on the high seas, the Great Lakes, or any navigable waters of the United States, or if happening to any of the passengers or crew on board of any vessel of the United States, then in whatsoever waters such vessel may have been at the time of such injury, such injury in every such case having been caused by the wrongful act, neglect, or default of another, and though amounting to a felony, then if such personal injury shall result in the death, whether on land or water of the person injured, an action in rem or in personam, as may be appropriate, may be brought for the exclusive benefit of the deceased's husband, wife, or next of kin, by the personal representatives of the deceased against the vessel, foreign or domestic, or the persons that would have been liable to the deceased if death had not occurred. And in such action such personal representatives may recover such damages as shall be fair and just compensation, with reference to the pecuniary damages resulting from such injury and death to the deceased's husband, wife, or next of kin, severally, not exceeding in all the sum of five thousand dollars, to be apportioned among them at the trial, according to the pecuniary damages severally sustained by them: ***Provided, however,*** That such action, if in rem, shall be brought within one year, or if in personam, within two years, after the decedent's death; but if the vessel or the persons liable be absent from the United States at the time of such death, the periods above limited for the commencement of the action against them, respectively, shall be counted from the time of the first presence of such vessel or persons within the United States, affording reasonable opportunity for service of process upon them after such injured person's death.

SEC. 2. That if at decedent's death any action brought by him to recover damages for such injuries be pending and undetermined, such action shall proceed no further, except that his personal representatives may, at their option, on petition to the court and upon such notice to the defendant as the court may direct, be substituted as plaintiff in that action, and such amendment of pleadings be made as the court may direct, and the action may, on order of the court, thereafter proceed for the recovery of damages pursuant to this Act, and not otherwise. If final judgment on the merits has been rendered in the deceased's lifetime in any action brought by him for such injuries, such judgment shall be a bar to any other action therefor, except for the enforcement of such judgment. Except as in this

any waters.[16] The proposal did not specify whether the action would be maintained in state or federal court, but it did state that it could be brought "in rem or in personam, as may be appropriate."[17] Damages were limited to $5,000.[18] "Congress was strangely unresponsive,"[19] however, and not one of the bills was reported out of committee.

On April 14, 1912 an event occurred which focused public attention on the subject of death at sea. The Titanic sank with the loss of 1517 lives. After studying the matter, the Senate Committee on Commerce found that the number of deaths at sea was increasing sharply.[20] On May 3, 1912 the MLA agreed to revise its wrongful death proposal. This draft was introduced in the Senate and House of Representatives four times in 1912

section provided, no other action than that given by the preceding section shall be maintained by reason of such injuries.

SEC. 3. That this Act shall not abridge the rights of shipowners and others to avail themselves of the provisions of sections forty-two hundred and eighty-two, forty-two hundred and eighty-three, forty-two hundred and eighty-five, forty-two hundred and eighty-six, and forty-two hundred and eighty-seven of the Revised Statutes of the United States, and Acts amendatory thereof and additional thereto relating to limitations of liability; nor the right of suitors to a remedy in personam in the courts of the several States and elsewhere for the recovery of damages pursuant to this Act against any person or corporation liable therefor.

SEC. 4. That in any action brought under this Act negligence or contributory negligence of the decedent shall have the same effect as to the damages recoverable as if the action were an action brought by the injured person, but the damages are not in any case to exceed the limit above provided.

16. *Id.* § 1.

17. *Id.*

18. *Id.*

19. Putnam, *The Remedy for Death at Sea*, 22 CASE & COM. 125, 128 (1915).

20. H. FARNAM, THE SEAMEN'S ACT OF 1915, S. DOC. NO. 333, 64th Cong., 1st Sess. 3 (1916).

and 1913[21] but was never reported out of committee. The 1912 version provided a wrongful death remedy for

21. H.R. 24764, 62d Cong., 2d Sess. (1912); S. 6930, 62d Cong., 2d Sess. (1912); H.R. 65, 63d Cong., 1st Sess. (1913); S. 1661, 63d Cong., 1st Sess. (1913). The provisions of these bills are as follows:

That whenever the death of a person shall be caused by wrongful act, neglect, or default on the high seas, the Great Lakes, or any navigable waters of the United States the personal representative of the decedent may maintain a suit for damages in the district courts of the United States in admiralty for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relatives against the vessel, person, or corporation which would have been liable to a suit for damages by or in behalf of the decedent by reason of such act if death had not ensued: *Provided*, That there shall be but one recovery by the person injured or by or in behalf of any of the persons mentioned in this section.

SEC. 2. That the recovery in such suit shall be a fair and just compensation to the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the pecuniary damage they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

SEC. 3. That suit shall be begun within one year from the death of the decedent, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged: *Provided, however*, That after the expiration of a period of one year from the decedent's death the right of action hereby given shall be deemed to have lapsed within ninety days after a reasonable opportunity to secure jurisdiction has offered.

SEC. 4. That if a person die as the result of wrongful act, neglect, or default occurring on the high seas, the Great Lakes, or any navigable waters of the United States during the pendency of a suit to recover damages for personal injuries in respect of such act the personal representative of the decedent may be substituted for the decedent as a party, and the suit may proceed as a suit under this Act.

SEC. 5. That this Act shall not affect the rights of shipowners and others to avail themselves of the provisions of the laws of the United States relating to limitation of liability.

SEC. 6. That all suits for damages for the death of a person caused by wrongful act, neglect, or default occurring on the high seas, the Great Lakes, or any navigable waters of the United States, wherever such death may occur, shall be deemed to be within the admiralty and maritime jurisdiction of the United States, and in all suits in admiralty recovery of damages for death so caused shall be had only under the provisions of

deaths caused by acts on the high seas, Great Lakes or any navigable waters of the United States.[22] For the first time the proposal took on the general form in which DOHSA eventually passed. The action was to be brought in the district courts of the United States in admiralty,[23] and the federal remedy was to be exclusive.[24] State common law remedies were preserved for deaths "occurring elsewhere than on the high seas."[25]

After slight rearrangement of its provisions, the MLA proposal was re-introduced in the House of Representatives in the Sixty-third Congress by Representative Peters and referred to the Committee on the Judiciary.[26] The

this Act; and where the death has been caused by wrongful act, neglect, or default occurring on the high seas, suit for damages shall not be maintained in the courts of any State or Territory or in the courts of the United States other than in admiralty.

SEC. 7. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the damages accordingly.

SEC. 8. That nothing in this Act shall be construed to abridge the rights of suitors in the courts of any State or Territory or in the courts of the United States other than in admiralty to a remedy given by the laws of any State or Territory in case of death from injuries occurring elsewhere than on the high seas.

22. *Id.* §§ 1, 6.

23. *Id.*

24. *Id.* § 6.

25. *Id.* § 8.

26. H.R. 6143, 63d Cong., 1st Sess. (1913). The provisions of this bill are as follows:

That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas, the Great Lakes, or any navigable waters of the United States the personal representative of the decedent may maintain a suit for damages in the district courts of the United States in admiralty for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relatives against the vessel, person, or corporation which would have been liable to a suit for damages by or in behalf of the decedent by reason of such act if death had not ensued.

bill still provided a wrongful death remedy on the high seas, Great Lakes and any navigable waters of the United

SEC. 2. That the recovery in such suit shall be a fair and just compensation to the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the pecuniary damage they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

SEC. 3. That suit shall be begun within one year from the death of the decedent, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged: *Provided, however,* That after the expiration of a period of one year from the decedent's death the right of action hereby given shall be deemed to have lapsed within ninety days after a reasonable opportunity to secure jurisdiction has offered.

SEC. 4. That if a person die as the result of wrongful act, neglect, or default occurring on the high seas, the Great Lakes, or any navigable waters of the United States during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted for the decedent as a party, and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section two.

SEC. 5. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall taken [sic] into consideration the degree of negligence attributable to the decedent and reduce the damages accordingly.

SEC. 6. That this Act shall not affect the rights of shipowners and others to avail themselves of the provisions of the laws of the United States relating to limitation of liability.

SEC. 7. That all suits for damages for the death of a person caused by wrongful act, neglect, or default occurring on the high seas, the Great Lakes, or any navigable waters of the United States wherever such death may occur shall be deemed to be within the admiralty and maritime jurisdiction of the United States, and in all suits in admiralty recovery of damages for death so caused shall be had only under the provisions of this Act; and where the death has been caused by wrongful act, neglect, or default occurring on the high seas suit for damages shall not be maintained in the courts of any State or Territory or in the courts of the United States other than in admiralty.

SEC. 8. That nothing in this Act shall be construed to abridge the rights of suitors in the courts of any State or Territory or in the courts of the United States other than in admiralty to a

States,[27] but it was favorably reported by the Committee and eventually passed by the House of Representatives.[28]

The most important feature of the bill, which had strong support from the MLA and American Bar Association,[29] was its granting of a uniform right of action in the federal admiralty courts.[30] Judge Harrington Putnam[31] had an important role in promoting the bill. He pointed out the major problem with the admiralty's borrowing of state statutes in a letter to the Chairman of the Subcommittee of the Judiciary of the House of Representatives which was published in the Committee's Report:

> In another limited liability proceeding arising from a collision more than 3 miles from land between steamships both owned by Delaware corporations the death statute of Delaware was applied. (The *Hamilton*, 207 U. S., 398.) These State statutes, however, are far from uniform. In some States the recovery is limited to the conscious suffering before death—a matter difficult of proof in case of drowning at sea. (The *Robert Graham Dunn*, 70 F. R., 271.) Other States only give the remedy against those who are common carriers, which would not apply to vessels chartered or engaged for a single owner. In a few States the remedy for damages must follow, or be concurrent with, a criminal prosecution, so that the offender must have been first indicted. Furthermore, corporations owning seagoing vessels are not confined to the States upon the seaboard. For reasons of taxation, or other supposed advantages, shipping corporations may be organized in a remote inland State, and if the vessels are negligently managed at sea the death remedy must be sought in the statutes of such State. If a collision be supposed between vessels of different States, having diverse systems of relief for death, obviously great difficulties would arise, especially in fixing damages.
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> * * *
>
> Such State statutes, diverse in their terms and conflicting in remedies, are but a poor makeshift for the uniform, simple legislation which Congress alone can enact.[32]

remedy given by the laws of any State or Territory in case of death from injuries received elsewhere than on the high seas: *Provided*, That there shall be but one recovery by the person injured or by or in behalf of any of the persons mentioned in section one.

27. *Id.* § 1.

28. 51 CONG. REC. 1465, 63d Cong., 2d Sess. (1913); 52 CONG. REC. 1076-77, 63d Cong., 3d Sess. (1915).

29. H.R. REP. No. 160, 63d Cong., 2d Sess. 2, 4, 6 (1913).

30. *Id.* at 1, 2.

31. Associate Justice of the Appellate Division of the Supreme Court of New York, Second Department.

The bill supported by the MLA and ABA was "designed to remedy this situation"[33] with its uniform application throughout the country. This bill also addressed some of the concerns which had prevented consideration of the prior measures. Although the remedy under the proposal was made exclusive for the high seas, it left "unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States."[34] This remedied the problem caused because "the States can not properly legislate for the high seas,"[35] and thus there was "no reason why the admiralty law of the United States should longer depend on the statute laws of the States and lag behind the general law of Europe."[36]

Echoing Judge Putnam's view, the chairman of the MLA, Mr. Fitz-Henry Smith, Jr., wrote: "The power to pass the proposed bill rests with Congress alone, for the

32. H.R. REP. No. 160 at 2; *see also* H.R. REP. No. 1419, 64th Cong., 2d Sess. 3 (1917); S. REP. No. 741, 64th Cong., 1st Sess. 3 (1916).

33. *Id.*

34. *Id.*

35. H.R. REP. No. 160 at 3; H.R. REP. No. 1419 at 4; S. REP. No. 741 at 4.

36. *Id.*

States can not regulate the admiralty and maritime law of the United States . . . ."[37] It was only the "absence of congressional action"[38] which had given rise to the use of state statutes: "The doubt in this case arises as to the power of the States where Congress has remained silent."[39]

When the bill introduced by Rep. Peters, H.R. 6143, was taken up for consideration on the floor of the House of Representatives in 1914, it met immediate resistance from Representatives Bryan of Washington and Mann of Illinois. Rep. Mann objected to the exclusive federal jurisdiction granted by the proposal: "Apparently it does away with or supersedes the jurisdiction over damages that occur within the States upon the Great Lakes and transfers the jurisdiction to the admiralty courts of the United States."[40] Recognizing that "a Federal statute would promote uniformity of law as between the States by wiping out the State statutes and would establish one Federal law for the sea and State laws for the land,"[41] Rep. Bryan introduced an opposition bill[42] and criticized

37. H.R. Rep. No. 160 at 4.

38. *Id.* at 5.

39. *Id.* (quoting *The Hamilton*, 207 U.S. 398, 404 (1907)).

40. 51 Cong. Rec. 1928, 63d Cong., 2d Sess. (1914) (statement of Rep. Mann).

41. 51 Cong. Rec. 2752, 63d Cong., 2d Sess. (1914) (statement of Rep. Bryan). Rep. Bryan recognized that "a Washington boat is subject to Washington law on the high seas as well as in State waters, unless Federal law conflicts." *Id.*

42. H.R. 12807, 63d Cong., 2d Sess. (1914). Rep. Bryan's proposal specifically provided that it would not "abridge the rights of suitors in the courts of any State or Territory to a remedy given by the laws of any State or Territory in case of injury or death from injury received on the high seas or elsewhere." *Id.* § 7. The bill did not provide that suit could be maintained in federal court. Further, liability under the proposal was not subject to the Limitation of Liability Act, 46 U.S.C. §§ 181-189 (1982). H.R. 12807 § 8. The provisions of this bill are as follows:

> That every person, firm, or corporation engaged in transporting of passengers or freight by water, or who shall own or operate any vessel or sailing craft on the high seas, Great Lakes, or any navigable water of the United States within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State, shall be liable in damages to any person suffering injury while such person is employed on any such vessel, or is a passenger thereon, or is on or upon any such vessel under any other conditions, or in case of death of any such employee, passenger, or person, to his or her personal representative, for the legal benefit of the surviving widow or husband or children of such person; and if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such person, firm, or corporation, or by reason of any defect or insufficiency due to its negligence in its engines, appliances, machinery, works, boats, wharves, or equipment.
>
> Sec. 2. That in all actions hereafter brought against any such person, firm, or corporation under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not be considered.
>
> Sec. 3. That in any action brought against any such person, firm, or corporation under or by virtue of any of the provisions of this Act to recover damages for injuries to or the death of any of its employees, such employee shall in no case be held to have assumed the risks of his employment to prevent or limit recovery.
>
> Sec. 4. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any such person, firm, or corporation to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such person, firm, or corporation under or by virtue of any of the provisions of this Act, such person, firm, or corporation may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or person entitled thereto on account of the injury or death for which said action was brought.
>
> Sec. 5. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued, or within two years from the death of the decedent, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, firm, or corporation sought to be charged: *Provided, however*, That after the expiration of a period of two years from the decedent's death the right of action hereby given shall not be

the bill approved by the Judiciary Committee as "a voice

from the tomb of the ages past."[43] Unlike Rep. Mann, Rep. Bryan did not "care so much who has jurisdiction."[44] He was willing to give the federal courts exclusive jurisdiction as long as the substantive provisions of the enactment were "good law."[45]

The original version of H.R. 6143 provided in pertinent part:

> That nothing in this Act shall be construed to abridge the rights of suitors in the courts of any State or Territory or in the courts of the United States other than in admiralty to a remedy given by the laws of any State or Territory in case of death from injuries received elsewhere than on the high seas . . . .[46]

After hours of debate,[47] the following provision was substituted as Section 6:

> That the right under this act to recover damages for the death of a person caused by wrongful act, neglect, or default, occurring on the high seas, the Great Lakes, or any of the navigable waters of the United States, wherever such death may occur, shall be deemed to be a right of recovery within the admiralty and maritime jurisdiction of the United States, but nothing in this act shall be construed to abridge the right of suitors in the courts of any State or Territory to a remedy given by the laws of any State or Territory in such cases.[48]

Rep. Webb summarized the effect of this provision:

> If the plaintiff does not want to go into the admiralty court under this bill, he need not. He can choose the remedies given him by his own State, and he can not complain if the United States does not give him any better remedy than his own State gives him.[49]

Even with this specific change, concerns were expressed over the language chosen in the amendment:

> It is exclusively the jurisdiction of the United States to legislate whenever it attempts to do so. Gentlemen forget that this jurisdiction belongs to the United States courts; it does not belong to the State courts and only exists in the States by sufferance; and when we assume the jurisdiction, when we say affirmatively that the right of action for death may be brought in the admiralty courts that is exclusive, except as to the very language and text of any exception we put into it . . . .[50]

Despite the concern over the wording of the bill, the proposal passed the House of Representatives on January 6, 1915 and was referred to the Senate where no action was ever taken.[51]

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deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.

SEC. 6. That any receiver or receivers of any person, firm, or corporation liable under this Act may be sued under the provisions of this Act without first obtaining the consent of any court under whose jurisdiction such receivers may have been appointed.

SEC. 7. That nothing in this Act shall be construed to abridge the rights of suitors in the courts of any State or Territory to a remedy given by the laws of any State or Territory in case of injury or death from injury received on the high seas or elsewhere.

SEC. 8. That the personal liability of any shipowner or person sued under this Act shall not be subject to any form of limitation on account of the provisions of Congress or general admiralty law as to limiting liability of shipowners.

43. 51 CONG. REC. 2753, 63d Cong., 2d Sess. (1914) (statement of Rep. Bryan).

44. 52 CONG. REC. 288, 63d Cong., 3d Sess. (1914) (statement of Rep. Bryan).

45. *Id.*

46. H.R. 6143, 63d Cong., 1st Sess. § 8 (1913).

47. 51 CONG. REC. 1927-30, 2751-56, 63d Cong., 2d Sess. (1914); 52 CONG. REC. 283-90, 63d Cong., 3d Sess. (1914); 52 CONG. REC. 1065-77, 63d Cong., 3d Sess. (1915); *see also* 52 CONG. REC. APP. 31-37, 63d Cong., 3d Sess. (1914) (remarks of Rep. Bryan).

48. 52 CONG. REC. 1065, 1069, 63d Cong., 3d Sess. (1915).

49. *Id.* at 1068 (statement of Rep. Webb).

50. *Id.* at 1074 (statement of Rep. Towner).

51. *Id.* at 1076-77.

After the opposition to its draft in the House of Representatives, the MLA met in May 1915 and decided to write a bill "intended to be supplementary to the local statutes and applicable to waters which they did not reach."[52] The MLA bill was introduced in the House of Representatives by Rep. Montague[53] and in the Senate by Senator Lodge.[54] As with H.R. 6143, the proposal was

52. Hughes, *Death Actions in Admiralty,* 31 YALE L.J. 115, 118 (1921).

53. H.R. 9919, 64th Cong., 1st Sess. (1916); *see* 53 CONG. REC. 1481 (1916).

54. S. 4288, 64th Cong., 1st Sess. (1916); *see* 53 CONG. REC. 2194. Rep. Webb from the Committee on the Judiciary introduced H.R. 60, 64th Cong., 1st Sess. (1915). This proposal was the same as the amended version of H.R. 6143 as it passed in the House of Representatives. No action was ever taken on Rep. Webb's bill after it was referred to the Committee on the Judiciary. 53 CONG. REC. 15 (1915). The provisions of H.R. 9919 and S. 4288 are as follows:

That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or on any navigable waters of the Panama Canal Zone, the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

SEC. 2. That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought, and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

SEC. 3. That such suit shall be begun within one year from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of one year the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered. After said period of one year it shall be barred as to an innocent purchaser for value without notice.

SEC. 4. That if a person die as the result of such wrongful act, neglect, or default as is mentioned in section one, during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section two.

SEC. 5. That in suits under this Act, the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.

SEC. 6. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State.

also supported by the American Bar Association.[55] This draft granted a wrongful death remedy in the federal district courts in admiralty for deaths caused by wrongful acts on the high seas beyond a marine league from the shore of any state or on any navigable waters of the Panama Canal Zone, the District of Columbia or the territories or dependencies of the United States.[56] The bill also provided that it would not affect state statutes for "causes of action accruing within the territorial limits of any State."[57] For the first time the drafters elected not to grant a uniform remedy in all navigable waters, leaving state remedies to apply in state waters and the federal remedy to apply on the high seas. The drafters of the bill at the MLA believed that this compromise "avoids conflict with State statutes and yet remedies a crying

55. S. REP. No. 741, 64th Cong., 1st Sess. 1 (1916); H.R. REP. No. 1419, 64th Cong., 2d Sess. 1 (1917). In April 1915, every member of the executive committee of the ABA "including its president, ex-Senator Elihu Root, united in a letter to the Senate Judiciary Committee asking that the Lodge bill [S 4288] be favorably reported." S. REP. No. 741 at 5; H.R. REP. No. 1419 at 4.

56. S. 4288, 64th Cong., 1st Sess. § 1 (1916).

57. *Id.* § 6.

defect in the maritime law as administered in this country . . . ."[58]

With minor amendments,[59] the bill was favorably reported to the floor of the Senate[60] where the only substantive discussion[61] prior to its passage in 1916[62] related to the power of the United States to create liability for foreign vessels on the high seas. The bill was referred to the Judiciary Committee in the House of Representatives which favorably reported the amended bill.[63] The bill never progressed to the floor of the House of Representatives, however.[64]

The amended bill which passed the Senate in 1916, S. 4288, was the basis for the final three bills introduced in Congress which led to the passage of the Death on the High Seas Act. This proposal was first introduced in 1917,[65] but the entry of the United States into World War I prevented its consideration. The proposal was reintroduced by Rep. Montague in 1919 in the House of Representatives,[66] and the bill which eventually became DOHSA, S. 2085,[67] was introduced into the Senate by

58. S. REP. No. 741 at 2; H.R. REP. No. 1419 at 2.

59. S. REP. No. 741 at 1.

60. 53 CONG. REC. 12168, 64th Cong., 1st Sess. (1916).

61. *Id.* (statement of Sen. Walsh).

62. 53 CONG. REC. 12168.

63. 53 CONG. REC. 12249 (1916).

64. 54 CONG. REC. 3641, 64th Cong., 2d Sess. (1917).

65. H.R. 39, 65th Cong., 1st Sess. (1917).

66. H.R. 5282, 66th Cong., 1st Sess. (1919).

67. S. 2085, 66th Cong., 1st Sess. (1919). The provisions of H.R. 39, H.R. 5282 and S. 2085 are as follows:

> That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or on any navigable waters of the Panama Canal Zone, the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.
>
> SEC. 2. That the recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.
>
> SEC. 3. That such suit shall be begun within two years from the date of such wrongful act, neglect, or default, unless during that period there has not been reasonable opportunity for securing jurisdiction of the vessel, person, or corporation sought to be charged; but after the expiration of such period of two years the right of action hereby given shall not be deemed to have lapsed until ninety days after a reasonable opportunity to secure jurisdiction has offered.
>
> SEC. 4. That if a person die as the result of such wrongful act, neglect, or default, as is mentioned in section 1, during the pendency in a court of admiralty of the United States of a suit to recover damages for personal injuries in respect of such act, neglect, or default, the personal representative of the decedent may be substituted as a party and the suit may proceed as a suit under this Act for the recovery of the compensation provided in section 2.
>
> SEC. 5. That in suits under this Act the fact that the decedent has been guilty of contributory negligence shall not bar recovery, but the court shall take into consideration the degree of negligence attributable to the decedent and reduce the recovery accordingly.
>
> SEC. 6. That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act as to causes of action accruing within the territorial limits of any State. Nor shall this Act apply to the Great Lakes or to any waters within the territorial limits of any State.
>
> SEC. 7. That this Act shall not affect any pending suit, action, or proceeding.

Sen. Nelson on June 17, 1919.[68]

Like its immediate predecessors, S. 2085 was endorsed by the MLA and ABA[69] and was the result of a com-

68. 58 CONG. REC. 1206, 66th Cong., 1st Sess. (1919).

69. S. REP. No. 216, 66th Cong., 1st Sess. 1 (1919); H.R. REP. No. 674, 66th Cong., 2d Sess. 1 (1920).

promise by which a federal wrongful death action was enacted for the high seas[70] but the remedy for wrongful death in state waters was left to state statutes.[71] The proposal was thought to reconcile the competing views which had prevented passage of a federal maritime wrongful death statute. "A certain distrust of admiralty courts, because of their diverse system of procedure and absence of juries" had led Congressmen to oppose prior drafts which overrode state statutes in inland waters.[72] Since the MLA bill would apply on the high seas "without the territorial jurisdiction of any state," the compromise left state laws "unaffected."[73] A "great wrong"[74] demanded a remedy:

> If the catastrophe [the sinking of the Titanic] had occurred, therefore, within the territorial limits of a state, there would have been a remedy, but these state statutes have no force upon the high seas, out of the limits of the state, and as Congress, which alone has authority to pass laws governing injuries on American vessels on the high seas, has not acted and given a remedy by statute, no remedy exists.[75]

After S. 2085 passed the Senate with minor amendments,[76] it was favorably reported by the Committee on the Judiciary in the House of Representatives[77] and re-

70. S. 2085, 66th Cong., 1st Sess. § 1 (1919).

71. *Id.* § 7.

72. Putnam, *The Remedy for Death at Sea*, 22 CASE & COM. 125, 128 (1915).

73. *Id.*

74. Cunningham, *Shall We Continue to Be Drowned at Sea Without Remedy?*, 22 CASE & COM. 129, 129 (1915).

75. *Id.*

76. 58 CONG. REC. 7172-73, 66th Cong., 1st Sess. (1919); *see also* S. REP. No. 216, 66th Cong., 1st Sess. 5 (1919).

77. H.R. REP. No. 674, 66th Cong., 2d Sess. (1920).

ferred to the House calendar.[78] On March 17, 1920, S. 2085 was called, and the first subject of discussion[79] was the meaning of Section 7 which preserved state remedies:

> That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any State. Nor shall this act apply to the Great Lakes or to any navigable waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.[80]

Rep. Moore suggested that the language preserving state remedies in state waters might be "superfluous"[81] because the federal remedy was already confined to the high seas in Section 1. In order to "remove any doubt as to the exclusive jurisdiction of the admiralty courts,"[82] he suggested that Section 1 be amended to specify that the admiralty jurisdiction be exclusive.[83] Rep. Montague defended the draft of the bill because "when the Congress legislates in pursuance of constitutional authority such a law is exclusive. It requires no asservation [sic] in the bill to make it exclusive. It is exclusive by virtue of its superior jurisdiction . . . ."[84] Rep. Mann then objected on the grounds that the bill was not intended to take away any *jurisdiction* "which can now be exercised by any State court."[85] He offered the following amendment to Section 7:[86]

78. 59 CONG. REC. 3484, 66th Cong., 2d Sess. (1920).

79. *Id.* at 4482.

80. S. 2085, 66th Cong., 1st Sess. § 7 (1919). This was originally Section 6, but the addition of a new Section 4 in the Senate caused the subsequent sections of the bill to be renumbered.

81. 59 CONG. REC. 4482, 66th Cong., 2d Sess. (1920) (statement of Rep. Moore).

82. *Id.* at 4483.

83. *Id.*

84. *Id.* (statement of Rep. Montague).

85. *Id.* at 4484 (statement of Rep. Mann).

"Page 3, line 12, after the word 'act,' strike out 'as to causes of action accruing within the territorial limits of any State.' "[87] A majority agreed to the amendment,[88] and the Statute was passed by the House with the amendment.[89] The Senate concurred in the House amendment without discussion[90] and the Death on the High Seas Act was signed into law by the President on March 30, 1920.[91]

Although there is considerable doubt as to the intent of Rep. Mann in the amendment to Section 7,[92] the expres-

86. Although Rep. Mann objected to the removal of state jurisdiction, he also stated: "the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not." *Id.*

87. *Id.*

88. 59 CONG. REC. 4486-87.

89. *Id.* at 4487.

90. *Id.* at 4674.

91. *Id.* at 4992.

92. In support of the amendment to Section 7, Rep. Mann repeatedly referred to the "jurisdiction" of the state courts: "I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court." 59 CONG. REC. 4484 (1920) (statement of Rep. Mann). "Where there is a provision to that effect there would be concurrent jurisdiction." *Id.* "If this act as originally drawn by the admiralty lawyers was intended for the purpose of taking away jurisdiction now conferred by State statutes, it ought to be very critically examined." *Id.* "Now, if we are told that where that right of action now exists under State statutes that suit can be brought in State courts, we propose to pass an act to take away that right, I do not see how we are progressing." *Id.* "That is the way it will be left, so that the act will not take away any jurisdiction conferred now by the States." *Id.* at 4485.

As in the case of H.R. 6143, which was passed by the House of Representatives in 1915, it was the fact that the federal act "supersedes the jurisdiction" of the states that Rep. Mann found objectionable. 51 CONG. REC. 1928 (1914) (statement of Rep. Mann). As Rep. Bryan explained:

> This bill if enacted into law would not only destroy the right of trial by jury, but would, when used in conjunction with the limiting-liability statutes, compel litigants to try their cases in the forum selected by the shipowner . . . .

sions of other Congressmen were quite clear. After the introduction of twenty-three bills over a period of thirty-two years, the drafters and supporters of S. 2085 and the Committees in the Senate and House of Representatives had come to a compromise to avoid the problems which had previously prevented passage of this legislation.[93] This compromise was based on the understanding and belief that the states could not competently legislate for the high seas.[94] Furthermore, it was believed that once Congress did legislate in an area, state statutes were superseded. Thus, when DOHSA established a federal remedy on the high seas while providing in amended Section 7 that state statutes would not be affected thereby, Congress did not intend that a state remedy would supplement the federal right they created on the high seas. The following discussion occurred between Reps. Mann and Igoe:

> It would deprive State courts and judges elected by the people of jurisdiction and transfer that jurisdiction to Federal judges, who sit, by appointment, for life.

51 CONG. REC. 2752 (1914) (statement of Rep. Bryan). Thus, when Rep. Mann. stated that the proposed bill "would be a good deal wickeder," 59 CONG. REC. 4485 (1920) (statement of Rep. Mann), he was reiterating the objection to exclusive jurisdiction in the federal admiralty courts where cases are tried not with juries but by appointed judges. *See Moragne v. States Marine Lines*, 398 U.S. 375, 400 n.14 (1970).

93. *See, e.g.*, 59 CONG. REC. 4486 (statement of Rep. Montague):

> This bill has been killed three or four times in other Congresses on three grounds: One, that it embraced the Great Lakes and inland waters; the second, that it did not provide for a jury trial; third, that there was no limitation upon the liability of shipowners, and that there ought to be such a limitation. These three objections, in some form or another, have been interjected heretofore to kill this very meritorious legislation. This bill as now worked out is not perfect, and no legislation is perfect, but certainly in the minds of the committee it is legislation that we would generally consider most wholesome and righteous for mankind.

94. S. REP. No. 216, 66th Cong. 1st Sess. 3 (1919); H.R. REP. No. 674, 66th Cong., 2d Sess. 4 (1920).

Mr. MANN of Illinois. Anybody could bring a suit under this act if he chose to.

Mr. IGOE. Not under your amendment if the State law gave a cause of action and a death occurred on the high seas.

Mr. MANN of Illinois. Where there is a provision to that effect there would be concurrent jurisdiction.

Mr. IGOE. No. If we pass a law for admiralty jurisdiction in the United States, it is exclusive in certain cases.[95]

Rep. Goodykoontz expanded the idea expressed by Rep. Igoe:

Mr. GOODYKOONTZ. Mr. Speaker, if this bill becomes law the jurisdiction of the admiralty and the State courts will not be concurrent. The admiralty court will have jurisdiction of the action if the cause of action arose on the high seas or on other navigable waters, and it is not within the power of Congress to further extend such jurisdiction. The jurisdiction of the States, as a matter of course, can not be taken away from them by congressional action. The constitutional clause upon which we predicate this measure gives Congress the power to prescribe a remedy for wrongful death occurring at sea. This power extends "to all cases of admiralty and maritime jurisdiction."

The object of section 7 of the bill is to manifest a recognition of the jurisdiction of the States as to matters that the State legislatures have the right to deal with. If you were to adopt the amendment proposed by the gentleman from Illinois [Mr. MANN] and eliminate the latter part of the first clause in the seventh section, which reads thus:

As to causes of action accruing within the territorial limits of any State—

95. 59 CONG. REC. 4484.

you would defeat the very object which the gentlemen desire to accomplish, namely, the preservation of the authority of the States. The effect of the amendment would be to leave the sentence incomplete and the remaining language, not unlike Mahomet's coffin, suspended between heaven and earth, having no application to anything in particular. Even if you treat this phrase as surplusage, it can do no harm, for the reason that that which is useless does not vitiate the useful. If we follow the line of decisions, beginning with Gibbons against Ogden, and coming on down, we will find that the Federal courts have exclusive jurisdiction whenever Congress exercises a power that may have hitherto remained dormant, and therefore it may be that the class of decisions in State courts, as in Delaware, would fall, except for the provision which was wisely inserted by experienced lawyers, who thrashed the matter out; and I have no doubt but that every word in that paragraph has a very particular and precise bearing and was designed to take care of an important legal situation.

If the amendment prevails, my judgment is that the State courts and their decisions will be superseded by the exclusive power and authority of the admiralty courts, and such result will be in harmony with the decisions of the Supreme Court in interpreting the commerce clause of the Constitution. I would like to see the bill pass in its present form. If it had been the law at the time the *Titanic* went down, the families of those who found a grave in the chilly waters of the great deep would not have gone out of court empty handed.[96]

The majority opinion from the court of appeals in the case at bar bases its decision on three pages of argument[97] in the Congressional Record taken out of context from

96. 59 CONG. REC. 4485-86.

97. 59 CONG. REC. 4483-85. *Tallentire v. Offshore Logistics, Inc.*, 754 F.2d 1274, 1280-81 nn.12 & 13 (5th Cir. 1985).

a history of more than thirty years of effort, debate, and discussion. When considered in context, even the discussion cited by the court leaves its conclusion in doubt. The court of appeals sets out the debate between Reps. Mann, Sanders and Volstead:[98]

> Mr. MANN of Illinois * * * *If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not.* In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.
> * * *
>
> Mr. SANDERS of Indiana. I would like to know what the effect of this law would be if the amendment offered by the gentleman from Illinois [Mr. MANN] be adopted with reference to this particular question: As thus amended, the first sentence in section 7 will read, "That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act." Now, as I understand it, if a person living in Illinois should be in the beneficiary class, should be, say, the widow of a person who had been killed on the high seas, that person may now bring action in personam in the State court of Illinois, and the damages recovered shall then be distributed in accordance with the provisions of the State statutes. Now, if this act is passed as thus amended, it will give that widow the right to elect as to whether she shall proceed under the terms of the act conferring jurisdiction upon the Federal courts with reference to this matter, or whether she shall proceed under the State statute of Illinois. Is that the gentleman's understanding?
>
> Mr. VOLSTEAD: That is my view of it, and my understanding is that in the form in which the bill at

98. *Tallentire*, 754 F.2d at 1281 n.13.

> one time was drawn there was a provision something like this, and there was a precautionary clause added to prevent a double action; that is, to prevent action first in the State court and then afterwards an action in the Federal court.[99]
> * * *

No "precautionary clause" was ever added or suggested by anyone to clarify the conflict between state and federal actions if it was intended by the amendment to permit overlapping federal and state wrongful death actions on the high seas. Instead of clarifying the potentially conflicting remedies, after listening to the remarks of Rep. Goodykoontz the House of Representatives proceeded to pass the bill with the amendment.

After the passage of DOHSA with its amended Section 7, the commentators interpreted the legislation in accord with the intent and purpose of its framers: to confine the application of Section 7 to state territorial waters where the preclusive effect of the federal remedy did not operate.[100] Noting Congress' belief that "the States can not

99. *Id.* (quoting 59 CONG. REC. 4484, 4485) (emphasis supplied).

100. "Hence it covers only waters a marine league from the shore of a state, or waters within regions where the federal government has exclusive jurisdiction." Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 119 (1921).

> Prior to the enactment of the Federal Act, as already noted, it was recognized in *The Hamilton* and *The James McGee* that the state death acts might be applied "extraterritorially" to cover deaths from fatal injuries received on the high seas. Section 7 of the Federal Act broadly provides "that the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act." At first blush it might seem that in a case like *The Hamilton* a libel might still be founded on the Delaware death statute, notwithstanding an alternative (or possibly cumulative) right of action under the Federal Act. Certainly Congress could never have foreseen any such result; and no doubt Section 7 read in the light of the act as a whole and its legislative history will be construed as a saving clause to maintain the efficacy of the state acts only in

properly legislate for the high seas,"[101] this Honorable Court concluded in *Moragne v. States Marine Lines,* 398 U.S. 375, 397 (1970), that "the discussion of the bill on the floor of the House evidenced the same concern that a cause of action be provided 'in cases where there is now no remedy.' "[102] This Honorable Court explained: "Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths *in territorial waters* . . . ."[103]

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cases of fatal injuries received in localities not covered by the Federal Act; that is within the territorial waters of the states. Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction,* 35 YALE L.J. 395, 422-23 (1926) (citations and footnotes omitted).

The possibility that the first sentence of §7 means that the Federal Act shall apply on the high seas only if there is no state act seems remote. Even if the state has a death act applicable in terms, the Federal Act supersedes it under the familiar doctrine that when Congress speaks the state law falls into abeyance.

Robinson, *Wrongful Death in Admiralty and the Conflict of Laws,* 36 COLUM. L. REV. 406, 410 n.19 (1936). "The Death on the High Seas Act clearly supersedes state Wrongful Death statutes as they were formerly applied to deaths on the high seas, but by its terms does not affect such state laws within their own territorial waters." Comment, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies,* 57 YALE L.J. 243, 271 (1947). Discussing *The Hamilton,* 207 U.S. 398 (1907), Benedict stated: "Whether these cases are of any present effect since the Act of Congress of 1920 has not been decided; but it would seem that they are no longer authoritative." 1 BENEDICT ON ADMIRALTY § 148 at 394 (6th ed. 1940).

101. *Moragne v. States Marine Lines,* 398 U.S. 375, 397 (1970) (quoting S. REP. No. 216, 66th Cong., 1st Sess. 3 (1919); H.R. REP. No. 674, 66th Cong., 2d Sess. 4 (1920)).

102. *Moragne,* 398 U.S. at 397 (quoting 59 CONG. REC. 4486, 66th Cong., 2d Sess. (1920) (statement of Rep. Montague)).

103. *Moragne,* 398 U.S. at 397 (emphasis added); *see also Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 620 n.9 (1978): "In addition, the statute preserved the applicability of local law on the Great Lakes, in the Panama Canal Zone, and within the States' territorial waters. § 767."

It is submitted that the simple deletion of the phrase "as to causes of action accruing within the territorial limits of any state" (which was only included "out of abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law"[104]) should not be interpreted as an affirmative amendment permitting a concurrent state remedy for death on the high seas beyond state territorial waters. When the House of Representatives passed H.R. 6143 in the Sixty-third Congress, the Congressmen who supported a preservation of state remedies *eliminated* the section of the statute which saved state remedies only in territorial waters and substituted a broader provision. Even that was challenged as not being adequate in view of the perceived federal supremacy.[105] In view of the strong statements made by the supporters of the bill regarding the superseding power of federal statutes[106] and in light of the doubt as to the intent of Rep. Mann in the amendment to Section 7, the general language preserving state remedies (which did not mention the high seas) cannot support the interpretation that Congress intended to create a cause of action for wrongful death on the high seas which was to operate concurrently with state wrongful death remedies.

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104. 59 CONG. REC. 4483 (statement of Rep. Montague).

105. *See supra* text accompaning notes 46-51.

106. The view taken by the parties who drew this bill is that it is exclusive, because, as the gentlemen from Virginia, [Mr. MONTAGUE] pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution, and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject.

59 CONG. REC. 4485 (statement of Rep. Volstead).

CONCLUSION

This Honorable Court should continue to interpret the Death on the High Seas Act in light of the intent of its framers and supporters and in view of the policy it intended to effect: a uniform federal death remedy for the high seas.

Respectfully submitted,

KENNETH G. ENGERRAND
Suite 500, Dresser Tower
601 Jefferson Street
Houston, Texas 77002
(713) 659-4816

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

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OFFSHORE LOGISTICS, INC., PETITIONER

v.

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v.

CORINE ANN SOUDELIER TAYLOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ROBERT L. WILLMORE
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

THOMAS L. JONES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether plaintiffs may supplement remedies under the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*, with those provided by state wrongful death statutes.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The United States operates thousands of ocean-going vessels and aircraft in the course of its extensive governmental and military activities. Generally speaking, the United States has waived its sovereign immunity from civilian suits arising within admiralty jurisdiction and is subject to wrongful death actions in much the same manner as private parties. See Suits in Admiralty Act §§ 1-12, 46 U.S.C. 741-752; Public Vessels Act §§ 1-9, 46

U.S.C. 781-789. The United States therefore has a strong interest in encouraging fair, uniform, and harmonious remedies for the redress of wrongful death on the high seas. Indeed, the Court requested the views of the United States in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), a case raising similar issues concerning maritime wrongful death. See 396 U.S. 952 (1969).

STATEMENT

On August 6, 1980, a helicopter owned and operated by petitioner Offshore Logistics, Inc., a Louisiana corporation, crashed into the Gulf of Mexico, 30 miles from the coast of Louisiana, killing the passengers (Pet. App. 2a, 43a, 62a). The helicopter was in maritime service, transporting persons from an offshore drilling platform to Houma, Louisiana (see *id.* at 6a, 22a, 31a, 51a). The widows of two decedents, respondents Corrine Taylor and Beth Tallentire, brought separate wrongful death actions against petitioner raising claims under both the Death on the High Seas Act (DOHSA), 46 U.S.C. 761 *et seq.*, and the Louisiana wrongful death statute, La. Civ. Code Ann. art. 2315 (West Supp. 1985). Pet. App. 2a, 31a, 62a.

Taylor, a Louisiana citizen, filed her action in the United States District Court for the Eastern District of Louisiana, invoking the federal court's admiralty jurisdiction, 28 U.S.C. 1333(1). Tarrentire, a Pennsylvania citizen, filed her action in the United States District Court for the Western District of Louisiana, invoking both admiralty jurisdiction (*ibid.*) and diversity jurisdiction, 28 U.S.C. 1332(a)(1). The suits were later consolidated in the Eastern District of Louisiana. See Pet. App. 6a n.6.

Upon pretrial motion by petitioner, the district court ruled that the DOHSA provides the exclusive remedy for death on the high seas and therefore dismissed respondents' claims based upon the Louisiana wrongful death statute (Pet. App. 2a, 31a-32a, 51a-52a). Petitioner admitted liability and the trial was limited to the question of damages (*ibid.*). The district court awarded Tallentire $265,110 in lost support and various smaller amounts of pecuniary damages (*id.* at 48a-50a). The court made a similar, but unliquidated, pecuniary damages award to Taylor (*id.* at 68a-70a). Respondents then appealed the district court's dismissal of the state wrongful death claims, contending that they were entitled to non-pecuniary damages under the Louisiana wrongful death statute.[1] They argued that Section 4 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1333, which adopts state laws to "[t]o the extent they are * * * not inconsistent with * * * other federal laws," incorporates state wrongful death statutes as part of the federal law for the continental shelf. They argued, in the alternative, that the state law applies of its own force and is not preempted by the DOHSA.

The court of appeals reversed, with one judge specially concurring and another judge dissenting (Pet. App. 1a-30a). The court first concluded that the OCSLA did not adopt the Louisiana wrongful death statute as a remedy for death caused by a helicopter crash on the high seas (Pet. App. 6a-8a). The court then addressed "the far more difficult question of whether state wrongful death statutes are preempted by DOHSA" (*id.* at 8a). It turned to Section 7 of the DOHSA, which provides (46 U.S.C. 767):

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

Upon examining the legislative history of Section 7, the court of appeals concluded that the provision was in-

[1] The DOHSA limits recovery to "fair and just compensation for * * * pecuniary loss" (46 U.S.C. 762) while the Louisiana wrongful death statute permits recovery for both pecuniary and nonpecuniary damages, "includ[ing] loss of consortium, service, and society" (La. Civ. Code Ann. art. 2315(B) (West Supp. 1985)).

tended to preserve state wrongful death actions on the high seas (Pet. App. 8a-13a). It rejected a series of contrary arguments pressed by petitioner and expressly declined to follow the Ninth Circuit's contrary decision in *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77 (1983). See Pet. App. 14a-17a. It further held that Louisiana had legislative jurisdiction to extend its wrongful death statute to remedy deaths on the high seas and that Louisiana, in fact, intended that result (*id.* at 18a-24).[2]

The court of appeals expressed great dissatisfaction with its conclusion that state wrongful death statutes can be applied on the high seas (Pet. App. 17a-18a) but ultimately determined that "[o]ur desire for a uniform, consistent, scheme of maritime death remedies cannot justify a refusal to follow the legislative will" (*id.* at 28a). Judge Jolly filed a special concurrence observing that the court's result "may create a mess in more than a few cases" but was nonetheless compelled by Section 7 of the DOHSA (Pet. App. 28a-29a). Judge Garza dissented, concluding that Section 7 was intended to preserve state wrongful death actions only in territorial waters (Pet. App. 29a-30a).

SUMMARY OF ARGUMENT

The Death on the High Seas Act (DOHSA) provides a comprehensive and exclusive remedy for wrongful death occurring on the high seas. Respondents are not entitled to supplement that federal remedy through invocation of state wrongful death statutes. Application of such statutes would be inconsistent with general principles of admiralty law, which emphasize uniform remedies for mari-

[2] The court of appeals added that a federal district court could apply the state wrongful death statute to diverse parties directly, as an exercise of diversity jurisdiction (Pet. App. 24a); it concluded that the district court, sitting in admiralty, could apply the state statute to non-diverse parties through its pendent jurisdiction over state law claims (*ibid.*; see *id.* at 6a n.6).

time injury, and with the language and legislative history of the DOHSA itself.

Admiralty law provides a cohesive and independent system of national maritime principles that generally displaces state law. This Court has emphasized the importance of a uniform maritime law throughout the nation's history. The principle of federal uniformity has received specific recognition in disputes involving maritime personal injury. However, maritime wrongful death, until recently, raised peculiar problems because general maritime law did not recognize a remedy for wrongful death. To fill the void caused by the absence of an applicable federal statute, admiralty courts applied state law remedies. The decision in *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), ended this regime by recognizing a general maritime remedy for wrongful death. Thus, general maritime law no longer accommodates state wrongful death statutes.

The DOHSA, like the general maritime law, provides a federal remedy for wrongful death that displaces otherwise applicable state law remedies. Although Section 7 of the DOHSA does provide, rather ambiguously, that "provisions of any State statute giving * * * remedies for death shall not be affected by this chapter" (46 U.S.C. 767), a careful review of the pertinent legislative history reveals that Section 7 was not meant to authorize the application of state wrongful death statutes in tandem with the DOHSA's comprehensive wrongful death remedy.

Section 7 of the DOHSA was intended to prevent inadvertent displacement of state law remedies that might be available in circumstances other than those covered by the DOHSA. Additionally, like the "savings to suitors" clause of the Judiciary Act of 1789 (ch. 20, § 9, 1 Stat. 77), Section 7 was intended to preserve state law only insofar as the application of that law was consistent with principles of maritime uniformity. Congress did not expect Section 7 to preserve application of wrongful death statutes on the high seas. To the contrary, Congress was

aware that contemporaneous precedent of this Court would preclude that result.

Since the DOHSA's passage, it has been generally understood that the Act creates an exclusive remedy for death on the high seas. If the DOHSA remedy were to be supplemented with remedies available under state wrongful death statutes, it would seriously undermine fundamental and settled principles of maritime uniformity and would create substantial anomalies. There is no reason to introduce needless confusion and discordance into a sound and workable federal remedy for death on the high seas.

ARGUMENT

PLAINTIFFS MAY NOT SUPPLEMENT THEIR REMEDIES UNDER THE DEATH ON THE HIGH SEAS ACT WITH REMEDIES PROVIDED IN STATE WRONGFUL DEATH STATUTES

Justice Cardozo once observed that "[d]eath is a composer of strife by the general law of the sea as it was for many years by the common law of the land." *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932). Congressional action, coupled with this Court's recent decisions, has largely eliminated the confusion surrounding the maritime response to wrongful death. As this case demonstrates, however, occasional uncertainty, largely of historical origin, continues to attend application of federal wrongful death remedies, including those provided by the Death on the High Seas Act (DOSHA), 46 U.S.C. 761 *et seq.*

The question in this case is whether the DOHSA wrongful death remedy may be supplemented through application of state statutes addressing wrongful death. In the view of the United States, respondents are not entitled to enlarge the DOHSA remedy through the invocation of a state statute that provides a different measure of damages. That result would be inconsistent with the general framework of admiralty law, which emphasizes uniform remedies for maritime injury, and with the language and legislative history of the DOHSA itself.

A. Federal Maritime Law Generally Provides the Exclusive Remedy for Maritime Wrongful Death

1. Article III of the Constitution provides that the federal judicial power shall extend to "all cases of admiralty and maritime jurisdiction." U.S. Const. Art. III, § 2. The Admiralty Clause reflects core principles of traditional federalism, authorizing the exercise of federal judicial power over matters of innately national concern.[3] It not only empowers Congress to confer admiralty jurisdiction on the lower federal courts; it also "empower[s] the federal courts * * * to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' * * * and to continue the development of this law within constitutional limits." *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 360-361 (1959) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 55 (1932)). Furthermore, "[i]t empower[s] Congress to revise and supplement the maritime law within the limits of the Constitution." *Romero*, 358 U.S. at 361.

As this Court expressly recognized in *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874), the Admiralty Clause embraces a fundamental concern for uniformity in maritime law. *Id.* at 574-575. The Court acknowledged that the precise scope of admiralty jurisdiction must be left to judicial development (*id.* at 574-576), but nevertheless stated (*id.* at 575):

> One thing, however, is unquestionable; the Constitution must have referred to a system of law co-

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[3] Alexander Hamilton wrote (rather intemperately):

> The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.

The Federalist, No. 80, at 497-498 (Lodge ed. 1908), quoted in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 361 n.8 (1959).

> extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

This view is consistent with that of the Constitution's framers.[4]

Of course, state law is not irrelevant to maritime matters. "The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history." *Romero*, 358 U.S. at 374. See, *e.g.*, *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1851). Moreover, since enactment of the Judiciary Act of 1789 (ch. 20, § 9, 1 Stat. 77), Congress has consistently recognized that federal courts adjudicate admiralty claims while "saving to suitors all other remedies to which they are otherwise entitled." 28 U.S.C. 1333(1). Nevertheless, "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Romero*, 358 U.S. at 373.[5]

Admiralty indisputably reaches suits alleging tortious personal injury at sea.[6] A maritime tort is "a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features * * *.'" *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953) (quoting *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924)). Thus, the resolu-

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[4] For example, James Madison stated at the Virginia Convention:

> There are strong reasons why there should be a Supreme Court to decide [certain] disputes. If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity. The same principles hold with respect to cases affecting ambassadors and foreign ministers. To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can be done only be giving the judiciary exclusive jurisdiction.

3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 532 (1836). Similarly, Governor Randolph stated:

> *Cases of admiralty and maritime jurisdiction* cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation, and intercourse with foreign nations, may be affected by admiralty decisions; as they ought therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.

Id. at 571 (emphasis in original). See note 3, *supra*.

[5] See, *e.g.*, *Kossick* v. *United Fruit Co.*, 365 U.S. 731 (1961) (holding that a maritime contract is not subject to a state statute of frauds); *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409 (1954) (holding that a state direct action statute may not be applied against a maritime insurer); *Union Fish Co.* v. *Erickson*, 248 U.S. 308 (1919) (holding that a maritime contract is not subject to a state statute of frauds); *The Roanoke*, 189 U.S. 185 (1903) (holding that a state may not create a maritime lien against an out-of-state ship for costs incurred in repair).

[6] This Court stated in *The Plymouth*, 70 U.S. (3 Wall.) 20, 36 (1865):

> Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

See also, *e.g.*, *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 672 (1982); *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 206 (1971); *Atlantic Transport Co.* v. *Imbrovek*, 234 U.S. 52, 60 (1914). The crucial factor in determining admiralty jurisdiction traditionally has been the location of the tort. As early as 1815, Circuit Justice Story concluded that "the jurisdiction of the admiralty depends * * * as to torts, upon locality, i.e., whether done upon the high sea, or ports within the ebb and flow of the tide, or not." *De Lovio* v. *Boit*, 7 F. Cas. 418, 440 (C.C.D. Mass. 1815) (No. 3,776).

tion of these suits is guided by the foregoing principles of federal supremacy. Federal maritime law—rather than state law—determines the measure of liability even when the tort occurs in state territorial waters or the plaintiff invokes state court or diversity jurisdiction. See, *e.g.*, *Kermarec* v. *Compagne Generale Transatlantic*, 358 U.S. 625, 628 (1959); *Pope & Talbot*, 346 U.S. at 409.[7]

Indeed, early in the twentieth century, this Court reiterated benchmark principles of federal maritime supremacy in personal injury cases. In 1917, the Court determined that a longshoreman, injured while unloading a docked ship, was engaged in maritime activity and must invoke federal maritime remedies rather than resorting to state worker's compensation laws. *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205 (1917). Citing *The Lottawanna*, the Court explained that the Constitution's grant of admiralty jurisdiction circumscribed the states' power to enact legislation modifying maritime rights. *Id.* at 216. It specifically stated (*ibid.*):

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

The Court concluded that federal maritime law could not tolerate the application of various state worker's compensation statutes to longshoremen in ports across the country, reasoning that the variations in applicable remedies would result in the "destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish." *Id.* at 217.[8]

[7] See also, *e.g.*, *Messel* v. *Foundation Co.*, 274 U.S. 427, 434 (1927) (requiring application of federal maritime law in a personal injury action brought in state court); *Robins Dry Dock* v. *Dahl*, 266 U.S. 449, 457 (1925) (same); *Carlisle Packing Co.* v. *Sandanger*, 259 U.S. 255, 259 (1922) (same); *Workman* v. *City of New York*, 179 U.S. 552, 557-558 (1900) (refusing to recognize a state law claim of municipal immunity in a negligence action brought in admiralty court).

The Court reached a similar conclusion the following year in *Chelentis* v. *Luckenbach S.S. Co.*, 247 U.S. 372 (1918). It rejected an injured seaman's argument that he was entitled to a state common law remedy of full indemnification rather than the traditional maritime remedy of maintenance and cure, stating (*id.* at 382):

[8] The Court thus established the "*Jensen* line," prohibiting the extension of state worker's compensation statutes to longshoremen injured seaward of the water's edge. See *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 306 & n.14 (1983). Congress later attempted to override the result in *Jensen* by specifically authorizing the application of state worker's compensation statutes to maritime injuries. See Act of Oct. 6, 1917, ch. 97, 40 Stat. 395 *et seq.* This Court invalidated that attempt as an unconstitutional delegation of federal maritime power, holding that Congress could not authorize the states to prescribe rules governing maritime injuries that "would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established." *Knickerbocker Ice Co.* v. *Stewart*, 253 U.S. 149, 164 (1920).

The Court later recognized a "maritime but local" exception to *Jensen*, applicable in cases where the "the application of local law [would not] materially affect" the uniformity of maritime law. *Grant Smith-Porter Ship Co.* v. *Rhode*, 257 U.S. 469, 477 (1922). That same year, Congress again attempted to authorize application of state worker's compensation laws to maritime accidents, this time excepting ship masters and crew from the state laws. Act of June 10, 1922, ch. 216, 42 Stat. 634 *et seq.* The Court again invalidated the legislation as an unconstitutional delegation of federal maritime power. *Washington* v. *W.C. Dawson & Co.*, 264 U.S. 219, 227-228 (1924). The Court noted that Congress had made "no attempt to prescribe general rules"; instead, it authorized "any State to alter the maritime law and thereby introduce conflicting requirements." *Id.* at 228. Congress, in response, ultimately passed the Longshoremen's and Harbor Worker's Compensation Act (see 33 U.S.C. 901 *et seq.*) which prescribes federal standards for compensation to injured longshoremen and related maritime employees. See generally *Perini*, 459 U.S. at 306-324.

Under the doctrine approved in *Southern Pacific Co.* v. *Jensen*, no State has power to abolish the well recognized maritime rule concerning measure of recovery and substitute thereof the full indemnity rule of the common law.

2. As these cases indicate, the principle of uniformity is deeply engrained in federal admiralty law. Admiralty law generally provides an exclusive remedy for maritime injury and supplants otherwise applicable state law. Although history temporarily muddled the question, it is now clear that the principle has equal application in the case of maritime wrongful death actions. In 1970, this Court expressly recognized a federal remedy under general maritime law for death caused by violation of maritime duties. *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970). This decision, overruling *The Harrisburg*, 119 U.S. 199 (1886), ended a striking anomaly in federal maritime law—admiralty reliance on state law to provide a remedy for certain instances of maritime wrongful death. 398 U.S. at 395-397.[9] The *Moragne* remedy, compelled by principles of uniformity in maritime law, brought consistency to an area previously dominated by "substantial debate and uncertainty." *Id.* at 378. It seems clear that the *Moragne* remedy displaces the previously applicable state wrongful death statutes.

As *Moragne* recognized, *The Harrisburg*'s denial of a federal remedy for maritime wrongful death created a void in admiralty law. 398 U.S. at 393. In the absence of a federal remedy, lower federal courts "accommodated the humane policies of "state wrongful death statutes by allowing recovery whenever an applicable state statute favored such recovery." *Ibid.*[10] In 1907, this

[9] *The Harrisburg* held that general maritime law, like the common law, provided a remedy for tortious injury but did not provide a remedy for wrongful death. 119 U.S. at 213. It instructed that admiralty courts must instead look to "a statute giving the right." *Ibid.*

[10] These cases seemingly relied on the notion that state legislation should be applied, in the face of congressional silence, because the

Court seemingly approved the application of a state wrongful death statute—at least "where Congress has remained silent"—in a damages action between two citizens of that state involved in an accident upon the high seas. *The Hamilton*, 207 U.S. 398, 404 (1907).[11] That decision, apparently of little practical consequence in cases involving death on the high seas,[12] no doubt en-

vessel was a part of the "territory" of the state, *International Navigation Co.* v. *Lindstrom*, 123 F. 475, 476 (2d Cir. 1903), or because the vessel was in territorial waters at the time of the accident, *City of Norwalk*, 55 F. 98, 105, 108 (S.D.N.Y. 1893).

[11] The Court did not discuss *The Harrisburg*. Instead, it reasoned that, absent constitutional limitations, a state could provide a remedy for death "outside the territory of the State * * * but within no other territorial jurisdiction" in a dispute involving solely its own citizens. 207 U.S. at 403. It stated that "where Congress has remained silent" a state is free to enact appropriate legislation (*id.* at 404) and that "the admiralty would not disregard, but would respect" the resulting rights (*id.* at 405). The Court gave short shrift to uniformity concerns, simply stating that its result would not "produce[] any lamentable lack of uniformity." *Id.* at 406. See also *La Bourgogne*, 210 U.S. 95 (1908).

[12] The Court noted in *Moragne* that "[t]he general understanding was that the statutes of the coastal states, which provided remedies for deaths in territorial waters, did not apply beyond state boundaries." 398 U.S. at 393 n.10. It suggested that "probably because most state death statutes were not meant to have application to the high seas, [*The Hamilton*] did little to fill the vacuum." *Ibid.* It appears equally true, however, that the courts observed *The Hamilton*'s implication that states may not apply their wrongful death statutes in cases involving parties from other states or nations. See *The Sagamore*, 247 F. 743 (1st Cir. 1917) (refusing to apply a Massachusetts wrongful death statute in a collision between Massachusetts and British vessels); *The Middlesex*, 253 F. 142 (D. Mass. 1916) (refusing to apply a Massachusetts statute in a collision between vessels of different states). Notably, *The Hamilton* was sharply criticized from its inception. See Whitlock, *A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts*, 22 Harv. L. Rev. 403, 414-416 (1908). Both recent and *Jensen* era commentators have suggested that *The Hamilton*'s reasoning was repudiated by *Jensen*. See Currie, *Fed-*

couraged continued application of state wrongful death statutes on state territorial waters. See *Patton-Tully Transp. Co.* v. *Turner*, 269 F. 334, 341 (6th Cir. 1920).

In 1920, Congress addressed admiralty's inadequate response to maritime death by enacting the Jones Act, 46 U.S.C. 688, governing the death of seamen, and the DOHSA, governing death on the high seas. At the time of passage, these Acts were largely viewed as supplanting otherwise applicable state law.[13] The federal courts continued to grapple, however, with that portion of *The Harrisburg*'s legacy that was undisturbed by Congress—the absence of a federal maritime remedy for wrongful death occurring on the territorial waters. This Court determined that:

> where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.

Western Fuels Co. v. *Garcia*, 257 U.S. 233, 242 (1921) (citing *Jensen*, *supra*). In the next 50 years, the Court rendered a series of maritime decisions attempting to apply state wrongful death statutes that it ultimately found impossible to reconcile.[14] Eventually, in 1970, the Court concluded that the remaining battlements of *The Harrisburg* were indefensible, stating:

> We do not regard *The Harrisburg* as a closely arguable proposition—it rested on a most dubious foundation when announced, has become an increasingly unjustifiable anomaly as the law over the years has left it behind, and * * * has produced litigation spawning confusion * * *. To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication.

Moragne, 398 U.S. at 404-405. The Court therefore overruled *The Harrisburg* and held that "an action does lie under general maritime law for death caused by violation of maritime duties." *Id.* at 409.

The Court had no occasion in *Moragne* to discuss whether the newly recognized federal remedy displaced

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eralism and the Admiralty: "The Devil's Own Mess," 1960 Sup. Ct. Rev. 158, 204; R. Hughes, *Handbook of Admiralty Law* 233 (2d ed. 1920).

[13] Following the Jones Act's passage, this Court held that the statute "is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several states." *Lindgren* v. *United States*, 281 U.S. 38, 44 (1930). Accord *Northern Coal Co.* v. *Strand*, 278 U.S. 142, 147 (1928); *Panama R.R.* v. *Johnson*, 264 U.S. 375, 392 (1924). The instant case presents the first opportunity for this Court to rule on the DOHSA's effect on state law. However, the leading commentators of the 1920's agreed that the DOHSA displaced application of state wrongful death statutes on the high seas. See 1 E. Benedict, *The American Admiralty* 208-209 (5th ed. 1925) ("Congress in 1920 enacted a statute governing [wrongful death] on the high seas but leaving the statutes of the several States in effect within their respective territorial waters"); *id.* at 211; Magruder and Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 Yale L. J. 395, 416 (1926) (the DOHSA "superseded the state death acts so far as they had been theretofore applied to wrongful deaths on the high seas").

[14] See, *e.g.*, *Goett* v. *Union Carbide Co.*, 361 U.S. 340 (1960); *Hess* v. *United States*, 361 U.S. 314 (1960); *The Tungus* v. *Skovgaard*, 358 U.S. 588 (1959); *Just* v. *Chambers*, 312 U.S. 383 (1941).

an otherwise applicable state wrongful death statute.[15] However, it seems clear that it must. Judicial creation of federal maritime remedies, like the creation of federal common law remedies, is premised on the existence of federal interests that preclude resort to state law. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641-642 (1981); cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 313 & n.7. (1981). The *Moragne* decision was necessary to protect the overriding federal interest in a uniform maritime remedy for wrongful death. The Court intended to "give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" 398 U.S. at 402 (quoting *The Lottawanna*, 88 U.S. (21 Wall.) at 575).[16] The creation of a concurrent federal remedy, standing alongside state remedial schemes, could not "supplant the present disarray" (398 U.S. at 405); it would simply add to the "torrent of difficult litigation" (*id.* at 408) that resulted from *The Harrisburg*. Indeed, if the federal maritime remedy for wrongful death had been recognized in the nineteenth century, there is no doubt that it would have been treated as an exclusive remedy under the principles that guided *Chelentis*, *Jensen*, and *The Lottawanna*. State statutes were applied only because wrongful death was

[15] The *Moragne* decedent had died in Florida territorial waters. Upon certification from the court of appeals, the Florida Supreme Court determined that the Florida wrongful death statute did not apply to maritime wrongful death. *Moragne*, 398 U.S. at 377.

[16] The Court specifically stated (398 U.S. at 401):

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts.

It further noted that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 401 n.15.

"untouched" by general maritime law. *Garcia*, 257 U.S. at 240.

Thus, we believe that the *Moragne* wrongful death remedy, like the Jones Act remedy, displaces otherwise applicable state law. This result, recognized in two principal maritime circuits,[17] fully comports with the principles of uniformity that generally control maritime personal injury law.

B. The Death on the High Seas Act Does Not Authorize the Application of State Wrongful Death Statutes in Addition to Its Comprehensive Wrongful Death Remedy

1. As the foregoing discussion demonstrates, admiralty application of state wrongful death statutes is an historical anomaly; it was inconsistent with general maritime principles and, under *Moragne*, should have little future importance. Against that background, the question presented by the instant case is whether the DOHSA has nevertheless preserved this historical curio as an operative principle in the case of death on the high seas. This question, at least insofar as it involves an issue of statutory construction, should be answered through examination of the language and legislative history of Section 7 of the DOHSA in light of general principles of admiralty law. A close examination of Section 7 reveals that it was not meant to preserve application of state wrongful death statutes on the high seas.

Section 7 provides in relevant part (46 U.S.C. 767):

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.

It employs rather unusual phraseology, professing noninterference with the "provisions" of state laws. Inter-

[17] See *Nelson* v. *United States*, 639 F.2d 469, 473 (9th Cir. 1980); *In re S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976).

preted according to its plain terms, Section 7 appears simply to state the unremarkable proposition that the DOHSA shall not alter the general content of state wrongful death statutes. It does not expressly address the maritime application of state statutes, and it certainly does not express an unambiguous intent to preserve the pre-DOHSA practice of invoking those statutes in admiralty. As the court of appeals acknowledged, "there has been considerable uncertainty over the effect of this seemingly simple provision" (Pet. App. 8a). Thus, the court correctly turned for guidance to the DOHSA's legislative history.

The DOHSA, prompted by the Titanic tragedy and other sea disasters, responded to the absence of effective remedies for maritime wrongful death.[18] The House and Senate reports indicate that the DOHSA was the final product of a number of attempts to replace divergent and ineffective state remedies with uniform federal legislation. H.R. Rep. 674, 66th Cong., 2d Sess. (1920); S. Rep. 216, 66 Cong., 1st Sess. (1919).[19] Section 7 of the

[18] The events leading to passage of the DOHSA are documented in various law reviews. See, *e.g.*, Hughes, *Death Actions in Admiralty*, 31 Yale L. J. 115 (1921); Whitlock, *supra*, 22 Harv. L. Rev. 403. Mr. Hughes, a noted scholar of admiralty and author of a leading admiralty treatise, was a principal draftsman of the DOHSA. See 31 Yale L. J. at 116. Mr. Whitlock provided input to the formulation of the DOHSA on behalf of the American Bar Association. See H.R. Rep. 674, 66th Cong., 2d Sess. (1920). See also Magruder and Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 Yale L. J. 395 (1926).

[19] The reports, supporting passage of S. 2085, 66th Cong., 1st Sess. (1919), reprint correspondence from the Maritime Association, the American Bar Association, and Judge Putnam of New York urging passage of previous DOHSA bills. The reports are virtually identical to those prepared for S. 4288, 64th Cong., 1st Sess. (1916). See H.R. Rep. 1419, 64th Cong., 2d Sess. (1917); S. Rep. 741, 64th Cong., 1st Sess. (1916). The correspondence specifically discusses the deficiencies in *The Harrisburg*, *The Hamilton*, and state legislation. The letters from the Maritime Association and the American Bar Association discuss S. 4288, a bill similar to S. 2085. Compare 54 Cong. Rec. 3641 (1917) (reprinting S. 4288), with 59 Cong. Rec. 4482 (1920) (reprinting S. 2085). The letter from Judge Putnam, however, is apparently directed to a previous bill, H.R. 6143, 63d Cong., 1st Sess. (1913), which differed markedly from S. 2085. See 51 Cong. Rec. 1928 (1914) (reprinting H.R. 6143).

DOHSA bill, as originally proposed in the 66th Congress, preserved state wrongful death actions only in territorial waters, providing (59 Cong. Rec. 4482 (1920) (emphasis added)):

> [T]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this act *as to causes of action accruing within the territorial limits of any state* * * *.

However, Section 7 was amended on the House floor, following a rather confused colloquy, to eliminate the italicized passage. See 59 Cong. Rec. 4482-4487 (1920). That colloquy "does not reveal the utmost precision in thought." *The Tungus*, 358 U.S. at 608 (Brennan, J., dissenting).

The colloquy initially centered on the scope and necessity of Section 7. Rep. Volstead, the floor manager of the bill, joined by Reps. Igoe and Montague, defended Section 7 in the face of charges that it was superfluous. They maintained that the DOHSA provided an exclusive federal remedy for death on the high seas, while Section 7 preserved the application of state law in territorial waters. 59 Cong. Rec. 4482-4484 (1920).[20] Rep. Moore

[20] Their statements were directed to comments from Reps. Sanders, Connally, and Cullen, who suggested that since the Act, by definition, would apply only to deaths on the high seas, the provisions of Section 7 were unnecessary (59 Cong. Rec. 4482-4484 (1920)) and to comments from Rep. Moore, who suggested that Section 7 preserved the application of state law on the high seas (*id.* at 4482, apparently referring to *The Hamilton*). Rep. Volstead stated that "my understanding is that the object of the act is to make a uniform rule for everything outside of the 3-mile limit." *Ibid.* Rep. Montague

suggested that it was unclear whether the bill created an exclusive federal remedy (*id.* at 4483). However, Rep. Montague replied that general admiralty principles would assure that the federal remedy was exclusive (*ibid.*).[21] Rep. Volstead agreed (*ibid.*). Rep. Sanders expressed continued concern that Section 7 might create "concurrent jurisdiction" (*id.* at 4484). At this juncture, Rep. Mann suggested an amendment deleting the portion of Section 7 italicized above (*ibid.*). He explained the amendment as follows (*id.* at 4484):

> Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. * * *. I was under the impression that this bill was not intended to take away any jurisdiction which can now be exercised by any State court. * * *.
>
> If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of a State or not. In other words, if a man had cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.

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added that Section 7 simply reflected "abundant caution, to calm the minds of those who think that rights within the territorial waters will be usurped by the national law." *Id.* at 4483. Rep. Igoe suggested that Section 7 would preserve a state remedy under *The Hamilton*, but only in territorial waters. *Ibid.*

[21] He stated (59 Cong. Rec. 4483 (1920)):

> [I]t has been held over and over again by our courts that when the Congress legislates in pursuance of constitutional authority such a law is exclusive * * *. It is exclusive by virtue of its superior jurisdiction; therefore, I submit, it is needless to amend this bill now and raise the chance of its defeat by adding a mere adjective when by the very force of the Constitution and the law in pursuance thereof it is inherently and necessarily exclusive.

Rep. Igoe objected to the amendment, noting that it could defeat the goal of uniformity (*ibid.*). However, Rep. Mann stated that if the bill "was intended for the purpose of taking away jurisdiction now conferred by state statutes, it ought to be very critically examined" (*ibid.*).[22] Rep. Volstead, joined by Rep. Goodykoontz, also objected to the amendment, but maintained that the bill would provide an exclusive remedy for death on the high seas, even if the Mann amendment were adopted.[23] A vote was finally taken and the amendment was defeated 12-10 (*id.* at 4486). Rep. Mann called for a quorum and another vote was taken without further debate. The amendment passed 201-75 (*ibid.*). The Senate later concurred in the amendment without discussion (*id.* at 4674).

2. Since the passage of the DOHSA, courts and commentators have generally assumed that the Act displaced application of state wrongful death statutes on the high seas, attaching little significance to the Mann amend-

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[22] Rep. Mann added: "[I]f we are told that where [the] right of action now exists under State statutes that suit can be brought in state courts [and] we propose to take away that right, I do not see how we are progressing" (59 Cong. Rec. 4484 (1920)). He further stated that, under his amendment, "the act will not take away any jurisdiction conferred now by the states" (*id.* at 4485).

[23] Rep. Volstead stated (59 Cong. Rec. 4485 (1920)):

> The view taken by the parties who drew this bill is that it is exclusive, because as the gentleman from Virginia [Mr. Montague] pointed out, the power to pass laws on this subject is conferred on Congress in the Constitution and whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subjects.

Similarly, Rep. Goodykoontz stated (*id.* at 4486):

> If the amendment prevails, my judgment is that the State courts and their decisions will be superseded by the exclusive power and authority of the admiralty courts and such result will be in harmony with the decisions of the Supreme Court in interpreting the commerce clause of the Constitution.

ment.[24] This longstanding consensus is entitled to great respect. Admittedly, it cannot wholly resolve the question. If statutes have meaning, then changes in proposed statutory language cannot be casually dismissed as meaningless. Like the court of appeals, we are unwilling to assume that the Mann amendment is null verbiage. But we cannot agree with the court below that the ambiguous statutory language and the confused floor colloquy demonstrate a congressional intent to thwart the DOHSA's central goal of creating an exclusive federal remedy for death on the high seas. That result would also be plainly at odds with established principles of maritime uniformity.

The " 'evaluation of congressional action * * * must take into account its contemporary legal context.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 379 (1982) (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 698-699 (1979)). Fidelity to congressional intent can be achieved only if the Mann amendment is "[r]ead in light of the state of maritime law in 1920." *Moragne*, 398 U.S. at 397. At that time, it was widely understood that state wrongful death statutes generally did not provide a remedy for death on the high seas. Indeed, the motivating factor prompting passage of the DOHSA was the *absence* of an effective remedy. See, *e.g.*, H.R. Rep. 674, *supra*; S. Rep. 216, *supra*. In debating a previous DOHSA bill, Rep. Mann himself

[24] They have generally concluded that the amendment worked no change in the meaning of Section 7 because "approval of the amendment represented no more than the acceptance of what appeared to be an innocuous change in language to facilitate the immediate passage of the legislation." *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85, 90 (N.D. Cal. 1954). That court added that "it appears to have been the unanimous view of both the cases and the commentators that the Act supersedes the state wrongful death statutes as to actions for death occurring on the high seas. An ambiguous and ill-considered amendment to the bill, which became the Act, is not sufficient justification for reaching a contrary conclusion at this late date." 121 F. Supp. at 91.

had stated that the states could not provide a remedy for death on the high seas.[25] Thus, it simply runs counter to general understanding to surmise that the Mann amendment was intended to accomplish that result.

Rep. Mann proposed his impromptu amendment in the course of a debate over the existence of "concurrent jurisdiction." See 59 Cong. Rec. 4484 (1920). He apparently was motivated by the concern that the DOHSA bill, as originally proposed, might inadvertently displace state court power to provide relief in situations not contemplated by the bill's sponsors.[26] In particular, Rep. Mann apparently was concerned that the bill would displace state remedies for wrongful death arising on inland waterways at distances greater than "a marine league from the shore of any State." See S. 2085, 66th Cong., 1st Sess. § 1 (1919) (*reprinted in* 59 Cong. Rec. 4482 (1920). During an earlier portion of the colloquy, he expressed specific concern that "if a man is injured *on the high seas within a State*" he should be entitled to maintain a suit in that state's courts. *Id.* at 4483(emphasis added).[27] Thus, his amendment apparently was intended

[25] See 51 Cong. Rec. 1928 (1914) ("the gentleman knows that the same reason affecting the admiralty courts' jurisdiction of accidents on the high seas, *where no states have jurisdiction*, would not apply to one of the Great Lakes where all of the bed of the lake is within some State") (emphasis added); *ibid.* ("If an accident occurs on the high seas, you can not bring a suit anywhere else than in the admiralty court; but if an accident occurs on the Great Lakes, where anybody is liable, you can bring suit in the State in which the lake lies").

[26] Rep. Mann's focus was plainly on preserving state court jurisdiction rather than preserving admiralty application of state wrongful death statutes. See, *e.g.*, 59 Cong. Rec. 4484 (1920) ("I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court."); *ibid.* ("In other words, if a man had cause of action and could get service, he could sue in state court and would not be required to bring suit in the Federal court.").

[27] Rep. Mann's reference to the "high seas within a State" is not internally inconsistent. This Court had interpreted the term "high

merely to protect state court jurisdiction from unforeseen inroads by unnecessarily restrictive language in Section 7.

Under these circumstances, it appears that Rep. Mann viewed his amendment as having an effect similar to that of the general "savings clause" that has long been a fixture of admiralty jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. 1333(1). The amendment simply ensured that state law would remain applicable in situations where the DOHSA would not provide a remedy and to the extent that contemporary principles of maritime uniformity permitted.[28] That interpretation is consistent with the remarks of Reps. Volstead, Montague, Igoe, and Goodykoontz, suggesting that the DOHSA would displace state wrongful death statutes on the high seas regardless of the Mann amendment—a prediction that Rep. Mann made no attempt to dispute.[29]

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seas," as used in a criminal statute, to include "navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation or people." *United States* v. *Rodgers*, 150 U.S. 249, 259 (1893). Thus, the Great Lakes are "high seas." *Ibid.* Of course the Great Lakes and the Canal Zone were specifically excluded from coverage under the DOHSA bill. See S. 2085, 66th Cong., 1st Sess. § 1 (1919) (*reprinted in* 59 Cong. Rec. 4482 (1920)). Rep. Mann noted, however, that "the same situation might arise in other states." 59 Cong. Rec. 4483.

[28] Indeed, Robert Hughes, a principal draftsman of the DOHSA, suggested this interpretation of Section 7 shortly after its passage. See Hughes, *Death Actions in Admiralty*, 31 Yale L. J. 115, 123-124 (1921). He noted that Section 7 "is a mere savings clause, and does not give the [state] statutes any effect that they did not have regardless of it." *Ibid.*

[29] Rep. Igoe stated to Rep. Mann: "If we pass a law for admiralty jurisdiction in the United States, it is exclusive in certain cases." 59 Cong. Rec. 4484. Rep. Mann replied: "If it is exclusive, then it does not affect this." *Ibid.* Later, Rep. Dewalt inquired of Rep.

At all events, even if Rep. Mann, in his own mind, did not intend that the DOHSA would provide an exclusive remedy for death on the high seas, it seems certain that Congress contemplated that result. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon*, 441 U.S. at 696-697. It was well established during this era that "in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction." *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 44 (1934). As Reps. Volstead, Montague, Igoe, and Goodykoontz plainly realized and explained, this Court's contemporaneous interpretation of the Admiralty Clause left no doubt that the DOHSA would displace state wrongful death statutes, regardless of the Mann amendment.[30]

Mann if it was "the intent of the legislators to give exclusive jurisdiction to the admiralty courts of the United States in regard to accidents on the high seas?" *Ibid.* Rep. Mann. replied: "I would not undertake to say. That is my recollection of it. Still, that may be the intent of the men who drew the bill." *Ibid.* Rep. Mann's equivocations are, of course, ambiguous. Their ambiguity, in turn, indicates that he did not intend to foreclose the possibility that the DOHSA, as ultimately applied, would provide an exclusive remedy for death on the high seas. See note 25, *supra* (quoting Rep. Mann's statements in a previous Congress that federal remedies alone could apply on the high seas).

[30] See notes 21, 23 & 29, *supra*. Indeed, this Court had recently proclaimed its unequivocal support for the principle of maritime uniformity, stating that the Admiralty Clause required displacement of state legislation that "contraven[ed]" federal maritime legislation or "work[ed] material prejudice" to general maritime law. *Jensen*, 244 U.S. at 216; see *Chelentis*, 247 U.S. at 372. Thus, the congressmen could confidently predict that the Court would treat the DOHSA as displacing state law, notwithstanding Rep. Mann's savings clause. Indeed, their prescience was confirmed—two months after the DOHSA's passage—in *Knickerbocker*, where the Court ruled that Congress could not preserve state worker's compensation

In light of this "contemporary legal context," Congress could not reasonably have concluded that the Mann amendment would detract from the DOHSA's exclusivity on the high seas. As noted above, a different conclusion would thwart both the expectations of Congress and the obvious purpose of the statute. See *Clark* v. *Uebersee Finanz-Korp*, 332 U.S. 480, 489 (1947) (statutes should not be construed "to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other").[31]

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statutes through the use of a "savings clause." 253 U.S. at 158-161. See note 8, *supra*. It was further confirmed by the Court's later determination that the DOHSA's sister statute, the Jones Act, displaced state law. *Lindgren*, 281 U.S. at 44. See note 13, *supra*. And it was echoed by contemporary commentators, who agreed that the creation of a federal maritime death remedy displaced state law. See *ibid.* Although Rep. Volstead did not solidly grasp that federal maritime law might be applied in state courts, see *Moragne*, 398 U.S. at 400 n.14, he was correct in concluding that, under this Court's prevailing precedents, the DOHSA remedy would displace state wrongful death remedies.

[31] By the same token, it seems clear that even if Congress intended that Section 7 of the DOHSA would permit application of state wrongful death statutes on the high seas, the operation of those statutes could not exceed the scope contemplated in 1920. As previously noted (see note 12, *supra*), *The Hamilton* imposed a number of major constraints on the high seas application of state wrongful death statutes. The state remedy was available only in the instance of a dispute wholly between intrastate parties, and only if the state intended its statute to have effect on the high seas. Additionally, it was questionable whether *The Hamilton* survived the *Jensen* era cases (see note 12, *supra*). Moreover, given Rep. Mann's insistence that he was preserving the power of state courts to apply state remedies (see notes 22, 26, *supra*), it appears that this theory of Section 7 would permit pursuit of the state statutory remedy solely in state courts and solely as a local alternative to the DOHSA remedy. Thus, if the Mann amendment preserved a state statutory remedy, it certainly was a strange and anomalous remedy of extremely circumscribed application. For example, in the present case, respondent Tarrentire could not invoke the state law remedy because her citizenship is diverse from that of petitioner. Although respondent

3. In our view, the Mann Amendment cannot reasonably be read to permit general application of state wrongful death statutes on the high seas. Admittedly, the language and legislative history of the amendment exhibit some ambiguity. However, one matter is clear—application of state wrongful death statutes on the high seas would depart from accepted principles of maritime uniformity and would create serious anomalies in admiralty law.

As previously discussed, principles of maritime uniformity require an exclusive federal remedy for maritime wrongful death in Jones Act cases (see, *e.g.*, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 154-155 (1964)), and in *Moragne* cases (see, *e.g.*, *Nelson* v. *United States*, 639 F.2d 469, 473 (9th Cir. 1980)). There is no reason to depart from those principles in DOHSA cases. The DOHSA, like the Jones Act, is a federal statute "of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." *Lindgren*, 281 U.S. at 44. As in *Moragne*, the application of state law would lead to "tensions and discrepancies * * * result[ing] from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts." 398 U.S. at 401.

The application of state law would run counter to the general understanding that the DOHSA provides a "national rule" for death on the high seas. *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624 n.18 (1978). This Court has observed that "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of non-pecuniary supple-

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Taylor perhaps could have originally invoked this theoretical state law remedy, she now would be precluded by her decision to pursue a DOHSA remedy in federal court, rather than the state alternative in the local forum.

ments." *Mobil*, 436 U.S. at 625. That observation holds true whether the supplement is founded on federal or state law. Indeed, it would seem particularly anomalous to supplement a federal maritime remedy with general state law remedies of non-maritime origin. Furthermore, it is difficult to justify why state wrongful death actions, foreclosed by *Moragne* in the case of death within a state's territorial waters, should be maintainable if death occurs *beyond* the state's territorial jurisdiction.

If law operated under the principles that guide archeology, there might be some practical reason to preserve high seas application of state wrongful death actions as an historical artifact of the pre-*Moragne* era. However, this Court has observed that "the same respect for the rule of law that requires us to seek consistency over time also requires us, if with somewhat more caution and deliberation, to seek consistency in the interpretation of an area of law at any given time." *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 391 (1983). The Court's obligations in this regard are particularly pronounced in the field of admiralty, where "this Court has fashioned a large part of the existing rules" (*Wilburn Boat Co.* v. *Fireman's Ins. Co.*, 348 U.S. 310, 314 (1955)).

The application of state wrongful death statutes on the high seas has its roots in *The Harrisburg*, which was overruled in *Moragne*, and in *The Hamilton*, which was subject to criticism from its inception. Since the passage of the DOHSA, the justification for high seas application of state wrongful death statutes has completely dissipated. The obvious conclusion—supported by the clear weight of authority—is that the DOHSA provides the exclusive remedy for death on the high seas.[32]

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[32] See, *e.g.*, *Nygaard* v. *Peter Pan Seafoods, Inc.*, 701 F.2d 77, 80 (9th Cir. 1983); *Barbe* v. *Drummond*, 507 F.2d 794, 801 n.10 (1st Cir. 1974); *Dugas* v. *National Aircraft Corp.*, 438 F.2d 1386, 1388 (3d Cir. 1971); See also, *e.g.*, 1 *Benedict on Admiralty* 7-52 (7th rev. ed. 1985) ("The need for uniformity requires that the Death on the High Seas Act supersede state wrongful death statutes."); Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 Colum. L. Rev. 648, 651 (1964) (accord).

Indeed, the issue appears to have been largely uncontroverted—at least in the appellate courts—since the DOHSA's passage. It would be most remarkable that, if Section 7 preserved state law remedies on the high seas, the contention could have escaped appellate recognition until now. See *United States* v. *Ross*, 456 U.S. 798, 819 (1982).

In sum, the court of appeals, in a well-intentioned search for meaning, simply read too much into Rep. Mann's amendment. The DOHSA can, in fact, be reconciled with the imperative need "for a uniform, consistent, scheme of maritime death remedies" (Pet. App. 28a). The court of appeals' decision, on the other hand, "defies reason, runs contrary to principles of the general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death in the high seas" (*id.* at 28a-29a) (Jolly, J., concurring). There is no need to preserve that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

ROBERT L. WILLMORE
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

THOMAS L. JONES
Attorney

DECEMBER 1985

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AMICUS CURIAE

BRIEF

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NO. 85-202

In the Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC., ET AL.,
Petitioners,

v.

BETH A. TALLENTIRE, ET AL.,
Respondents.

AIR LOGISTICS, INC., A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner,

v.

CORRINE ANN SOUDELIER TAYLOR,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF BETH A. TALLENTIRE AND CORRINE ANN SOUDELIER TAYLOR, RESPONDENT

Peter Perlman, President
388 South Broadway
Lexington, Kentucky 40508

Paul S. Edleman, Esq.
Kreindler & Kreindler
99 Park Avenue
New York, New York 10016

Ross Diamond, III, Chairman
Admiralty Law Section
62 North Royal Street
Mobile, Alabama 36602

GEORGE & GEORGE, LTD.
James A. George
A Professional Law Corporation
8110 Summa Drive
Baton Rouge, Louisiana 70809
(504) 769-3064

Counsel for Amicus Curiae

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No. 85-202

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

Offshore Logistics, Inc., et al,
Petitioners,

v.

Beth A. Tallentire, et al,
Respondents.

Air Logistics, Inc., A Division of
Offshore Logistics, Inc.,
Petitioner,

v.

Corrine Ann Soudelier Taylor,
Respondent.

BRIEF AMICUS CURIAE ON BEHALF OF THE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
IN SUPPORT OF BETH A. TALLENTIRE AND
CORRINE ANN SOUDELIER TAYLOR,
RESPONDENT

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

CONSENT OF PARTIES

Pursuant to Rule 36 of the U. S. Supreme Court Rules, this Brief Amicus Curiae is being filed with the written consent of all parties to the case, copies of which are attached hereto, in support of Beth A. Tallentire and Corrine Ann Soudelier Taylor, Respondents.

STATEMENT OF INTEREST

This Brief Amicus Curiae is being submitted by the Admiralty Law Section of the Association of Trial Lawyers of America, a national Bar Association consisting of more than 50,000 lawyers who primarily represent plaintiffs in personal injury and death litigation. The Admiralty Law Section includes many attorneys throughout the United States who specialize in maritime personal injury law.

The pending case is of great importance and will decide the maritime law on the question presented. It will affect the welfare of many plaintiffs in maritime cases now pending throughout the United States.

We believe that, based on our experience, research, and analysis of

the law, and in the interest of the safety of offshore workers, our brief argument will be of assistance to the Court and will be limited to the following question.

QUESTION PRESENTED

Whether or not Congress intended the Death On the High Seas Act, 46 U.S.C. §§761, et seq., (hereinafter frequently referred to simply as "DOHSA"), to be the exclusive remedy for wrongful deaths occurring more than one marine league from shore, where there exists a remedy available under state law.

SUMMARY OF ARGUMENT

Prior to the enactment of DOHSA, the General Maritime Law of the United States did not recognize a claim for

wrongful death. In order for a decedent's beneficiaries to recover, they were forced to rely on an applicable state wrongful death statute, provided one existed. In order to alleviate the inequities arising when a wrongful death occurred on the high seas where no state wrongful death remedy was available, Congress enacted the Death on the High Seas Act.

DOHSA, enacted in 1920, granted the proper party a claim for wrongful death, where the death occurred on the high seas, by providing that the personal representative may maintain a suit for damages in a district court of the United States, in admiralty. Since the passage of this statute, there has been much debate concerning whether or not Congress intended the Act to be the

exclusive remedy for wrongful deaths occurring on the high seas when the adjacent state provides a remedy. Section 1 of the Act uses permissive language and has been interpreted to establish concurrent, rather than exclusive, Federal jurisdiction.

The legislative history of DOHSA shows Congress' intent not to preclude the application of state wrongful death statutes to deaths occurring on the high seas and Congress expressed its intent by providing that "the provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 46 U.S.C. §767.

This sentence of Section 7 is Congress' clear and unambiguous statement that the Death on the High

Seas Act was merely remedial in nature and was designed solely to provide a remedy where none existed under the appropriate state law.

Under the appropriate rules of statutory construction, it is assumed that Congress expresses its purpose through the ordinary meaning of the words it uses and, because the statutory language is unambiguous, the courts should not go beyond the express intention of Congress to rewrite DOHSA.

Some courts have held that the doctrine of uniformity mandates that DOHSA be interpreted as the exclusive remedy for wrongful death even when the adjacent state has a wrongful death remedy. The need for uniformity in maritime torts will not be affected by interpreting DOHSA to allow the

application of state law in that uniformity in wrongful death actions mandates the need to ascertain the liable parties and does not require a uniform application of the elements of damages for the proper party beneficiary.

The Death on the High Seas Act was passed as a remedial measure to allow the proper party to recover damages for deaths occurring on the high seas where the appropriate state provided no cause of action. Congress chose, as evidenced by the unambiguous language of the Act, not to enact exclusive Federal jurisdiction for wrongful deaths occurring on the high seas. The decision rendered below is a correct interpretation of the Death on the High Seas Act and should be affirmed.

ARGUMENT

CONGRESS CLEARLY DID NOT INTEND THE DEATH ON THE HIGH SEAS ACT, 46 U.S.C. §§761, ET SEQ., TO BE THE EXCLUSIVE REMEDY FOR WRONGFUL DEATHS OCCURRING ON THE HIGH SEAS. THE UNAMBIGUOUS LANGUAGE OF SECTION 7 OF THE ACT MANDATES THE APPLICATION OF THE APPROPRIATE STATE'S WRONGFUL DEATH REMEDY TO DEATHS ON THE HIGH SEAS.

JURISPRUDENCE PRIOR TO DOSHA

Prior to Congress' enactment of the Jones Act[1] and DOHSA,[2] the admiralty law of the United States, regardless of the location of the casualty, did not recognize a claim for wrongful death. The Harrisburg, 119 U.S. 199 (1886), Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). State courts possessed the power to apply state wrongful death remedies, where they existed, for deaths that occurred on the high seas. In The Hamilton, 207 U.S. 398 (1907), two vessels, whose owners were incorporated in Delaware, collided on the high seas.

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1 46 U.S.C. §688

2 26 U.S.C. §761, et seq.

In applying the Delaware wrongful death statute, this Court reasoned that a state can enforce liabilities of its citizens or corporations on the high seas and outside the jurisdiction of another sovereign. The Court also suggested that state law could supplement maritime law and provide a remedy for death on the high seas where the plaintiffs and defendants were from the state and the state intended its law to cover accidents outside territorial waters.

THE DEATH ON THE HIGH SEAS ACT

In order to determine whether or not Congress intended that DOHSA be the exclusive remedy for wrongful deaths occurring on the high seas, the Act itself must be examined. Section 1 of the Act provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued. (emphasis added).

The language used in §1 of DOHSA contains no express indication that the Federal remedy is exclusive. Section 761 merely grants admiralty jurisdiction to the personal representative who "may maintain a suit". The use of this permissive language indicates an intent to establish concurrent, rather than exclusive, jurisdiction. Alexander v.

United Technologies Corp., 548 F.Supp. 139 (D.Conn. 1982). The first sentence of this section would be rendered meaningless if DOHSA were to be construed to supersede existing state remedies for deaths on the high seas. Safir v. Compagnie Generale Transatlantique, 241 F.Supp. 501 (E.D.N.Y. 1965).

Congress has the power to mandate exclusive Federal jurisdiction for all wrongful death claims brought in American forums. U.S. Const. Art. 6. Congress, by use of the permissive language in §761, has chosen not to do so and the express language of DOHSA has been found not to warrant the conclusion that the statute supersedes all existing state remedies. Alexander, supra; Lowe v. Trans World Airlines, Inc., 396 F.Supp. 9 (S.D.N.Y. 1975).

In reviewing the legislative history of DOHSA, this Court, in Moragne v. States Marine Lines, 398 U.S. 375 (1970), found that "the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Id. at 400.

The permissive language "may maintain" allows the proper party to maintain an action, in admiralty, if jurisdiction and recovery under the Act are specifically pleaded, similar to a Fed. R. Civ. P. 9(h) claim. Nothing in the Act prevents the proper party from filing a claim in state court, applying

the appropriate state's wrongful death statute.

An additional express intention of Congress not to preclude the application of state wrongful death statutes to deaths occurring on the high seas was embodied in §767:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal zone."

The first sentence of Section 7 unambiguously states Congress' intent not to affect the provisions of any state statute giving or regulating rights of action or remedies for death.

Where resolution of a question of Federal law turns on a statute and the

intention of Congress, the Court should look first to the statutory language and then to the legislative history if the statutory language is unclear. Blum v. Stenson, 104 S.Ct. 1541 (1984). Sections 761 and 767 of the Act are clear, the intention of Congress is evident on the face of the Act, and the courts should not exercise judicial license by rewriting DOHSA.

It should generally be assumed that Congress expresses its purpose through the ordinary meaning of the words it uses. Absent a clearly expressed legislative intention to the contrary, statutory language must ordinarily be regarded as conclusive. Escondido Mutual Water Company v. La Jolla, 104 S.Ct. 2105 (1984); North Dakota v. United States, 460 U.S. 300 (1983);

Consumer Product Safety Commission v. GTE Sylvania, 447 U.S. 102 (1980). Interpreting the Act in accordance with the prescribed rules of construction, this Court is bound to apply Section 7 in accordance with its intent so that the provisions of any state statute giving or regulating rights of actions or remedies for death are not affected. As this Court has warned, "{g}oing behind the plain language of a statute in search of a possibly contrary Congressional intent is 'a step to be taken cautiously' even under the best of circumstances." American Tobacco Company v. Patterson, 456 U.S. 63 at 75 (1982), citing Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 at 26 (1977); see also Connecticut v. Schweiker, 684 F.2d 979 (D.C. 1982).

Assuming, arguendo, that the legislative history of 46 U.S.C. §671, et seq. should be considered, the dialogue contained in the congressional record supports an interpretation of the act allowing the application of state wrongful death statutes to deaths occurring on the high seas. Section 7 of the bill, in its original form, provided:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this act as to causes of action accruing within the territorial limits of any state. Nor shall this act appply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal zone."

Prior to the vote, Congressman Mann offered an amendment, revising the first sentence of §7 to read:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter".

In support of his amendment, Congressman Mann stated:

> "Now, I do not know whether I am right or wrong about it, because I have not examined the report on this bill carefully as reported this time. But I remember this bill very distinctly in my previous Congresses, and my impression, which very likely may be erroneous, is that the purpose of the bill was to confer jurisdiction in certain cases of death where no jurisdiction now exists. I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any state court. I may be wrong about that...if the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any state statute, whether the cause of action accrued within the territorial limits of the state or not.

> In other words, if a man had a cause of action and could get service, he could sue in a state court and not be required to bring suit in the Federal Court." 59 Cong. Rec. 4483 (1920).

The bill, with Mr. Mann's amendment, passed.

The more plausible interpretation of the Act is that it provides a remedy for those claimants who would otherwise be without one because the jurisdiction in which their wrongful death claim arose did not recognize such a cause of action. If Congress desired to preclude the previously available state remedies rather than merely provide remedial Federal legislation, it would be expected to have spoken in more forceful terms. This conclusion is buttressed by the equivocation implicit in Section 7, which disclaims that the

Act alters state statutory remedies for death. Complaint of Exxon Corporation, 548 F.Supp. 977 at 978 (S.D.N.Y. 1982), citing Lowe v. Trans World Airlines, Inc., 396 F.Supp. 9 (S.D.N.Y. 1975).

When reading the Act in its historical perspective, it is apparent that Congress intended to alleviate the inequities involved in a wrongful death occurring on the high seas where the appropriate state had no wrongful death statute. This is further exemplified by the Congressional debate concerning the passage of the Act:

> MR. IGOE...I think it would be well to leave that language so that the action may be permitted under those state laws when the accident occurs within the jurisdiction of the state, but that when the accident or death occurs beyond this limit, then it is governed under this law, because there is no remedy now in all cases.

> MR. VOLSTEAD. The state laws do not always apply. In some states there are no remedies.
>
> MR. SANDERS of Indiana. What I am trying to find out is whether it is intended here to give concurrent jurisdiction under Section 7 of the state authority and the Federal authority in some cases, and whether it is intended to give exclusive jurisdiction to the Federal authorities in certain cases and to state authorities in certain cases?
>
> MR. IGOE. This is to give the right of action where there is none now in the Federal Court. Of course, where the owners of a vessel submit to the limitation of liability there might be a recovery now, because of having submitted themselves voluntarily to the jurisdiction. It is evident that the Act was merely intended to provide the minimum protection for deaths occurring on the high seas where no remedy at state law existed and was never intended to be the exclusive remedy for deaths occurring on the high seas

> where the contiguous state has an applicable wrongful death act.

59 Cong. Rec. 4483 (1920).

UNIFORMITY IS NOT AN OBSTACLE TO THE APPLICATION OF STATE LAW

It is commonly accepted that "uniformity" of the General Maritime Law was a major factor in the Court's decision in Moragne. In Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77 (9th Cir. 1983), the court, in refusing to apply Alaska's wrongful death statute, citing Nelson v. United States, 639 F.2d 469 (9th Cir. 1980), held that the need for uniformity in wrongful death actions requires the preemption of state wrongful death statutes by the General Maritime Law.

In Dennis v. Central Gulf Steamship Corporation, 453 F.2d 137 (5th Cir.

1972), the court, citing Dugas V. National Aircraft Corporation, 438 F.2d 1386 (3d Cir. 1971) and Petition of Gulf Oil Corporation, 172 F.Supp. 911 (S.D.N.Y. 1959), held that damages for pain and suffering are not recoverable under DOHSA but that the Act does not exclude such recovery under another cause of action when deaths occur on the high seas, and recognized that an action brought by dependents under DOHSA for a non-seaman decedent does not prevent the plaintiff from recovering state survival damages in the same suit. In considering the illusory problem of uniformity, the court stated:

> (e)ven if a situation exists where the applicable state law does not provide damages for decedent's pain and suffering for a wrongful death on the high seas, this disparity does not destroy the uniformity mandated by Moragne. The 'uniformity'

> that is fundamental in maritime law has to do with the bases of liability, not with differing elements of damages that may be recoverable in different circumstances with different classes of beneficiaries. Dennis at 140.

It would appear that Nygaard's refusal to apply the Alaska statute because of a lack of uniformity is unfounded.

It is generally agreed that DOHSA does not preempt the field of recovery for injuries sustained on the high seas which result in death. If a relevant state statute provides for wrongful death benefits, admiralty should entertain them. Abbott v. United States, 207 F.Supp. 468 (S.D. N.Y. 1962), 60 Colum. L.Rev. at 536-37, and authorities cited therein.

CONCLUSION

In the appropriate historical perspective, DOHSA was enacted to provide a remedy for deaths occurring on the high seas where none existed at state law and, by its permissive language, was never intended to be the exclusive wrongful death remedy for such claims. The Act is written in clear and unambiguous terms and the Court should not interpret the statute in a manner inconsistent with its expressed intentions. The Court should affirm the decision below.

Respectfully submitted on behalf of the Association of Trial Lawyers of America:

Peter Perlman, President
388 South Broadway
Lexington, Kentucky 40508

Paul S. Edelman, Esq.
Kreindler & Kreindler
99 Park Avenue
New York, New York 10016

Ross Diamond, III, Chairman
Admiralty Law Section
62 North Royal Street
Mobile, Alabama 36602

GEORGE & GEORGE, LTD.
A Professional Law Corporation
8110 Summa Drive
Baton Rouge, Louisiana 70809
Tel: (504) 769-3064

BY: James A. George

Counsel for amicus curiae

PROOF OF SERVICE

I, James A. George, attorney of record for the Association of Trial Lawyers of America, applicant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 3RD day of January, 1986, I served copies of the foregoing brief, on the several parties herein, as follows:

1. On Beth A. Tallentire and Corrine Ann Soudelier Taylor, respondents, by mailing copies in a duly

addressed envelope, with first class postage prepaid, to their attorneys of record: Philip E. Henderson and Charles Hanemann, Henderson, Hanemann & Morris, 300 Lafayette Street, Houma, Louisiana, 70360; V. Farley Sonnier, Davidson, Meaux, Sonnier & McElligott, 810 South Buchanan Street, Lafayette, Louisiana, 70512.

2. On Offshore Logistics, Inc. and Air Logistics, Inc., petitioners, by mailing copies in a duly addressed envelope, with first class postage prepaid, to their attorney of record: Keith B. Jones, Fulbright & Jaworski, 1150 Connecticut Avenue, N.W., Washington, D.C., 20036.

James A. George
Counsel for amicus curiae

AMICUS CURIAE

BRIEF

NO. 85-202

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC., et al

Petitioners

versus

BETH A. TALLENTIRE, et al

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENTS, TALLENTIRE, et al, BY DOMENGEAUX & WRIGHT

William Rutledge
Post Office Box 3668
Lafayette, Louisiana 70502-3668
Telephone: 1-800-252-1953
ATTORNEY FOR
DOMENGEAUX & WRIGHT
AMICUS CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 85-202

OFFSHORE LOGISTICS, INC., et al
Petitioners

versus

BETH A. TALLENTIRE, et al
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS BRIEF IN SUPPORT OF RESPONDENTS, TALLENTIRE, et al, BY DOMENGEAUX & WRIGHT

AMICUS INTEREST

We represent Louisiana workers who regularly helicopter to work on the Continental Shelf offshore Louisiana; when the copter goes down, we represent their families.

QUESTION PRESENTED

Whether Section 7 of the High Seas Act (46 USC 767) should be read in explicit application: "The provisions of any state statute giving or regulating rights of action or remedies for death shall not affected by this [Act]. Nor shall this [Act] apply [at all] to the Great Lakes or to any waters within the territorial limits of any state * * *," so that the Louisiana state death statute gives a remedy for death on the high seas *in personam*, not *in rem*, against a Louisiana citizen.

SUMMARY OF ARGUMENT

Congress presumably knew of the case law existing when it passed the High Seas Act and its savings-clauses.

The clauses clearly save to suitors their rights under foreign and state law for death on international waters since the act applies only to the high seas.

Restriction to national waters would result in nullity unless the clause is construed as merely explanatory surplusage, a dubious explanation in itself.

Before the High Seas Act the courts applied state death statutes to international waters *in personam* to its citizens, without hesitation.

The rub came when the libel claimed a maritime lien generated by state law, which might mar the uniformity of maritime law; or where a state statute was applied to defendants of other states or foreign countries with the possibility of international incident; or where it was admitted or held that the state statue was not extraterritorial even on the high seas. Not one of these concerns exists here.

Moragne established common maritime survival-rights on state waters; it did not destroy state survival there; Louisiana state law is broader than *Moragne* rights if the latter require dependancy, for the state statute does not; *Moragne* may have greater depth if the state statute does not embrace unseaworthiness. But *Moragne* reveals no concept of preemption by federal maritime survival rights in state waters.

State-law rights for death on state waters are saved to suitors not by the savings clause of the High Seas Act but by that of the Original Judiciary Act and are thus not affected by any doctrine of preemption whether based on the theory

of filling voids in maritime law or not.

Since Louisiana death law is an election on state waters, policy favors it as an election on the high seas in a case such as this one. This would be consistent with the Outer Continental Shelf Act and its incorporation of state law.

Higgenbotham did not involve the point raised here; in fact, its call for strict interpretation supports the allowance of state law in the instant case.

A circuit court's factual conclusions about surrogate state law should rarely be reviewed and are correct here.

The policies of the Shelf Act and the Seas Act should be made compatible so far as practicable. The former looks to upland Louisiana for law on the Shelf governing platform workers there. An election of state law under the High Seas Act would be complementary with regard to remedies and beneficiaries. This way, the family of a worker killed when a helicopter crashes into the high seas would have the same rights as the family of a worker killed while standing on a platform in the high seas when a helicopter crashes into it; at least there should be a choice.

There is neither reason nor policy for ignoring the literal command of the High Seas Act that there be an election both in case of *foreign* (46 USC 764) states and *domestic* (46 USC 767) state law.

The judgment of the Circuit Court should be affirmed.

ARGUMENT

The Circuit Court's Decision In The Present Case Is Historically Correct.

Its dissent is not. The latter says that Congress's savings clause in the High Seas Act only saves state's rights on state water. Since the Act by label is limited to international waters, such a restrictive savings would be a nullity other than explanatory surplusage, rarely a conclusion of statutory interpretation. It has nothing to do with state's waters; why save state's rights where there is not need to do so? By the boundaries of the Act, Congress could only save to suitors claims under state law for death on international waters. The argument that Congress included the savings clause only to prevent confusion on state waters is drowned in language that is plain and clear enough to show exactly what Congress meant. The High Seas Act virtually opens with a pronouncement that it pertains to death on the high seas and then saves statutes of both foreign and domestic states:

> "*Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any state*, or the district of Columbia, or the Territories, or dependancies of the United States," (emphasis added) (46 USC 761) [then the personal representative may sue thereunder for the family's benefit.]

The first thing pinned down by the Act is exact location of application, "beyone a marine league from the shore of any state."

The Act then saves state rights, again, both foreign and

domestic. First it carefully states that "Whenever a right of action is granted by any *foreign* State on account of wrongful death by wrongful act, neglect, or default occurring upon the high seas," (emphasis added,) (46 USC 764) then suit may lie in admiralty for such foreign rights. Then Congress, after such explicitness about location, turns to *domestic* states: "The provisions of any state Statute giving or regulating rights of action or remedies for death shall no be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State or to any navigable waters in the Panama Canal Zone." (46 USC 767)

Since Congress had just designated locus of application twice in the Act before turning to domestic states, specifically, the high seas beyond a marine league from the shore of any state, the absence of a repititious third occasion in the clause saving rights under domestic state-law creates no ambiguity nor shows that Congress was talking about something else other than what it has been talking about throughout the entire Act, rights on the high seas. Congress expressly limited application of the Act to the high seas where rights were bestowed by a foreign state and Congress knew that domestic state statutes had been applied to international waters because this Court had applied them. The absence of a restriction within a restriction, i.e., "rights of action or remedies for death [on territorial waters] shall not be affected by this chapter," is a clear indication that Congress intended state death acts to apply on all navigable waters, national and international if the state statute so allows.

Old Dominion S.S. Co. v. Gilmore, (The Hamilton), 207 U.S. 398, 28 S.Ct. 133 (1907) settled that "the Delaware statute applies to a claim for death on the high seas, arising purely from tort, in proceedings in admiralty" *in personam*

against Delaware citizen. "Nor would there be produced any lamentable lack of uniformity;" (page 135) and with the observation that "So far as the objection to the state law is founded on the admiralty clause in the Constitution, it would not seem to matter whether the accident happened near shore or in mid ocean, notwithstanding some expressions of doubt;" (page 134) and with a further ruling that "Apart from the subordination of the State of Delaware to the Constitution of the United States, there is no doubt that it would have had power to make its statute applicable to this case. When so applied, the statute governs the reciprocal liabilities of the two corporations, existing only by virtue of the laws of Delaware, and permanently within its jurisdiction, for the consequences of conduct set in motion by them there, operating outside the territory of the state, it is true, but within no other territorial jurisdiction. * * * No one doubts the power of England or France to govern their own ships upon the high seas." (Page 133, *et seq.*.)

Surely Congress had this case well in mind, handed down scarcely more than a decade by the only court that the Constitution commissioned as the supreme ruler of the admiralty. There can hardly be a presumption of forgetfulness nor oversight. The case was ultimate clarification authored by a master at it. Where there is neither claim of lien nor international complications, the conclusion has come rather easily to the courts that, in cases *in personam*, state death statutes may be used to recover for death on the high seas; one of the more thoughtful discussions is found in *In Re: Petition of the Long Island North Shore Passenger and Freight Co.*, 5 Fed. Cas. 599 (D.C. S.D. N.Y., 1881) by the scholarly Judge Choate.

In a case arising in Louisiana, on second consideration, the Circuit Court held in *The E. B. Ward, Jr.*, 17 Fed. Cas. 456 (Cir. Ct. E.D. La., 1883) that state law could generate in a proper case a cause of action for death on the high seas.

Thus Justice Holmes's analysis in *The Hamilton, supra,* could hardly be considered in the eyes of Congress a backwater rationale cut off from the mainstream of jurisprudence.

The courts never made heavy distinction between national and international waters in cases *in personam*. These cases may have asserted, hinted, doubted or rejected that maritime law itself provided for survival; but where there was a finding of survival on any basis, maritime or state law, the international character of the waters rarely played a part where no maritime lien was claimed and sometimes none where it was. (See Appendix "A" for a summary of such cases.)

These cases are strung out in the appendix to impress in only one direction, not they are right or wrong, not shaky or sound, but that they existed in a long line well before Congress began its deliberations of the High Seas Act. If there is any weighted purport to them, it is to the effect that state law applies to that state's citizens on the high seas in a simple suit *in personam*. Nothing in the evidence of Congressional debate contradicts this.

Congress had to deal with these cases, knew it did, and did so in its savings clause. The Circuit Court's dissent that this saving was intended for state waters is simply wrong historically. And experience has caused citizens to expect to be governed by laws of the state they "belong to," foreign or domestic. *Deslions v. La Compagnie Generale Transatlantique*, 210 U.S. 95, 28 S.Ct. 644, 679 (1907).

[Note: The Circuit Court observed that its holding led to an inconsistency of state laws now being applicable on international but not national waters. If this observation is not considered significant, please skip directly to page 20, starting with "What About Higginbotham?" since pages 8 through 19 deal with this assertion.]

What Does Moragne[1] *Mean Here?*

Moragne created or finally recognized general maritime survival for death on state waters. The Circuit Court, as it acknowledged in the present case, has held that such survival preempts state law on state water. *In Re: S/S Helena*, 529 F.2d 744, 753 (5th Cir. 1976). So it considered the continuance of state statutes on international, but not national waters strange. Does such a situation actually exist now?

A close reading of *Moragne* indicates no holding express or implied that an election of state remedy on state water is now prohibited. *Moragne* established; and it did so merely to assure accommodation of maritime concepts that a state statute perhaps did not embrace. This is far from preemption; the comments closest to preemption are simply not close enough, 90 S.Ct. 1787 and following:

> The resulting discrepancy between the remedies for death covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness could not have been foreseen by Congress. Congress merely declined to disturb state remedies at a time when they appeared adequate to effectuate the substantive duties imposed by general maritime law. That action cannot be read as an instruction to the federal courts that deaths in territorial waters, caused by breaches of the evolving duty of seaworthiness, must be *damnum absque injuria* unless the States expand their remedies to match the scope of the federal duty.

1. *Moragne v. State Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970).

To put it another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.

That our conclusion is wholly consistent with the congressional purpose is confirmed by the passage of the Jones Act almost simultaneously with the Death on the High Seas Act. As we observed in Gillespie v. United States Seal Corp., 379 U.S. 148, 111, 85 S.Ct. 308, 312, 13 L.Ed.2d 199 (1964), the Jones Act was intended to achieve "uniformity in the exercise of admiralty jurisdiction" by giving seamen a federal right to recover from their employers for negligence regardless of the location of the injury or death. That strong concern for uniformity is scarcely consistent with a conclusion that Congress intended to *require* the present nonuniformity in the effectuation of the duty to provide a seaworthy ship. Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. *E. g.*, Hess v. United States, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed. 2d 305 (1960); Goett v. Union Carbide Corp., 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed.2d 341 (1960). Such uniformity not only will

> further the concerns of both of the 1920 Acts but also will give effect to the constitutionaly based principle that *federal admiralty* law should be "a system of law coextensive with, and operating uniformily in the whole country." The Lotawanna, 21 Wall. 558, 575, 22 L.Ed. 654 (1875). We conclude that the Death on the High Seas Act was not intended to preclude the availavility of a remedy for wrongful death under general maritime law in situations not covered by the Act. (Emphasis Added)

In fact, this Court had first to conclude in *Moragne* that there was no congressional intent that state law itself be exclusive in state water, 90 S.Ct. 1785:

> There should be no presumption [from the passage of the High Seas Act that Congress has removed this Court's traditional responsibility to vindicate policies of maritime law by ceding that function [of providing a remedy for death on state water] exclusively to the states.

This seems a long way from a holding that this Court in one decision established general maritime law for death on state waters and then made it exclusive; there was certainly no need generated by the facts of the case to do the latter when the factual issue before the Court was limited to determination whether state law should provide the "sole remedy." Footnote 15 at 90 S.Ct. 1788:

> The incongruity of forcing the States to provide the *sole* remedy to effectuate duties that have no basis in state policy is highlighted in this case. The Florida Supreme Court ruled that the state wrongful-death act

> was concerned only with "traditional common-law concepts," and not with "concepts peculiar to maritime law such as 'unseaworthiness' and the comparative negligence rule." It found no reason to believe that the Florida Legislature intended to cover, or even considered, the "completely foreign" maritime duty of seaworthiness. 211 So.2d, at 164, 166. Federal law, rather than state, is the *more* (emphasis added) appropriate source of a remedy for violation of the federally imposed duties of maritime law. Cf. Hill, The Law-making Power of the Federal Courts: Constitutional Preemption, 67 Col.L.Rev. 1024 (1967); Note, The Federal Common Law, 82 Harv.L.Rev. 1512, 1523-1526 (1969).

It is worth noting that this problem of lack of congruence between maritime duties and state remedies was not presented in *The Harrisburg*. The problem there was that the relevant state statutes of limitations had run, and petitioner sought a federal remedy to which they would not be applicable. The Court did not discuss the standards of behavior comprehended by the state law or by maritime law, and nothing indicates that the state law was not wholly adequate to vindicate substantive maritime policies in a suit brought within the state-prescribed period. Cf. McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed.2d 1272 (1958).

So the Fifth Circuit's rationale in *S/S Helena, supra,* made without apparent later approval by this Court, that although a youngster, while zipping about on his motorboat on waters deep within the state, is killed by a tow coming down on him, his family would not be able to use state law even or solely to determine nature and extent of beneficiaries and relief, as they would if he had been killed while zipping about on a motorcycle, by an 18-wheeler on shore a hundred yards away; such conclusion is not apparent to say the least.

Certainly Congress can legislate a preemption that will spell the twilight's last gleaming for a state statute on navigable waters, as in longshoremen's compensation, for example, *Calbeck v. Travelers Ins. Co.*, 70 U.S. 114, 82 S.Ct. 1196 (1962). But *Moragne* is not such an expression of legislative intent. And every bird, legislative or judicial, is not of the same feather of that species that must push the others out of the nest to thrive as intended; rivalry does not necessarily mean ejectment but possibly election; today, for example, workers on the platforms of the Shelf have an election of workman's compensation, state or federal, for injury and death there. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980).

To the contrary it does sound strange to talk about "adoption to fill a void" for a death deep within a state occurring on water hardly more than knee high but deep enough to float a light barge: "In *Levinson v. Deupree*, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed 1319, the Court was not concerned with the situation in which the duty alleged to have been broken was clearly federal as is that in the instant case, and it was apparently assumed that the right to be enforced was grounded in state law. 'The action was not a seaman's or harbor worker's action at all, but rather arose out of collision between two motorboats on the Ohio River, fatal to a girl riding in one of them.' " *The M/V "Tungus" v. Skovgarrd*, 359 U.S. 588, 79 S.Ct. 503, at 79 S.Ct. 513. "It [the Indiana

Death Statute] only declares a general principle respecting the liability of all persons within the jurisdiction of the State, for torts resulting in the death of parties injured. And, in the application of the principle it makes no difference where the injury complained of occurred in the state, whether on land or on water." *Sherlock v. Alling*, 93 U.S. 99, 23 L.Ed. 819 (1876). Of course the elements of liability are or may be governed by federal law, *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 98 L.Ed. 143, 74 S.Ct. 202 (1954); but this has been standard practice for a long time although the identity of the beneficiaries and extent of relief have always been considered matters of state law on state waters: "Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would [as to liability] be controlling." 74 S.Ct. 205.

Apparently, however, the Fifth Circuit's conclusion that state law is no longer applicable to death on state waters rests upon an analysis that such law was merely adopted to fill a void in the first place. This Court's decisions cut the ground from under that. Death actions in state courts under state law for death on state waters are not saved by a special saving clause found in the High Seas Act, but by the basic savings clause of the original Judiciary Act. *American Steamboat Co. v. Chace [310]*, 16 Wall. 522, 83 U.S. 522, 523, 21 L.Ed. 369 (1876), 371, *et seq.*, where this Court held before *The Harrisburg* that:

> Where no remedy exists for an injury in the admiralty courts, the fact that such courts exist and exercise jurisdiction in other causes of action leave the state courts as free to exercise jurisdiction in respect to an injury not cognizable in the admiralty as if the admiralty courts were unknown to the Constitution and had no existence in our jurisprudence. * * * Difficulties, it must

be conceded, will attend the solution of the question, but it is not necessary to decide it in the present case, as the jurisdiction of the state court may be supported whether such a suit [for wrongful death] *may or may not* be maintained in the admiralty courts. (Emphasis added.) Sufficient has already been remarked to show that the state courts have jurisdiction if the admiralty courts have no jurisdiction, and a few observations will serve to show that the jurisdiction of the state courts is equally undeniable if it is determined that the case is within the jurisdiction of the admiralty courts. Much discussion of that topic cannot be necessary, as several decisions of this Court have established that rule as applicable in all cases where the action in the state court is in form a common law action against the person, without any of the ingredients of a proceeding *in rem* to enforce a maritime lien. Where the suit is *in rem* against the thing, the original jurisdiction is exclusive for the district courts, as provided in the 9th section of the Judiciary Act; but where this suit is *in personam* against the owner, the party seeking redress may proceed by libel in the district court, or he may, at his election, proceed in an action at law, either in the circuit court if he and the defendants are citizens of different states, or in a state court as in other cases of actions cognizable in the state and Federal Courts exercising jurisdiction in common law cases, as provided in the 11th section of the Judiciary Act. *Leon v. Galceran*, 11 Wall. 188, 20 L.Ed. 75. He may have an action at law in the case, supposed, either in the circuit court or in a state

> court, because the common law in such a case is competent to give him a remedy, and whenever the common law in such a case is competent to give a party a remedy, the right to such a remedy is reserved and secured to suitors by the saving clause contained in the 9th section of the Judiciary Act. 1 Stat. at L. 78; *The Belfast*, *supra.*; *The Moses Taylor*, *supra.*; *The Hine v. Travor*, *supra.*

This appears a square holding that there is an "election", in cases of death on state waters, required by the original Judiciary Act, between federal and state causes of action in the absence of paramount legislation by Congress.

This election was extended from national to international waters by the savings clause in the High Seas Act in plain, clear and unequivocable terms. *American Steamboat Co. v. Chase* cannot be read to say that the mere existence of a federal, but judicially created remedy on state waters precludes a state remedy for death there. It clearly says that there is an election. And the election is not between federal and state courts, but federal and state laws because death on state waters is such a local matter: "It might be asked why, if the grant of jurisdiction to the courts of the United States imports a power in Congress to legislate, the saving of a common-law remedy, i.e., in the state courts, did not import a like if subordinate power in the states." Justice Holmes dissenting at 37 S.Ct. 532, in *Southern Pacific Company v. Jensen*, 244, U.S. 205, 37 S.Ct. 3524, 61 L.Ed. 1086 (1917). *Western Fuel Company v. Garcia*, 257, U.S. 233, 242, 42 S.Ct. 89, 66 L.Ed. 210 (1921).

If this is correct, then the strange situation found by the Circuit Court in the present case, of an election on international waters but none on national waters, simply

does not exist. The local maritime doctrine is applicable.

This Court has lent its support to this rationale many times, *Just v. Chambers*, 312 U.S. 383, 61 S.Ct: 687 (1941), at 61 S.Ct. 692:

> But these contentions [about harmony and uniformity] proved unavailing and the principle was maintained that a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, and provided that the state action "does not contravene any Acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations." * * * Respondent argues that, in relation to wrongful death, the maritime law has left the matter "untouched" (The Harrisburg, supra.) and thus the state law was admitted to supplement the maritime law, while in the instant case there is a positive rule of admiralty against the survival of the cause of action. That is, in the one case, there was said to be a "void" in the maritime law, which the state law may fill, while in the other there is an attempt to modify an existing principle. This is subtlety which we think does not merit judicial adoption. The admiralty rule in the case of wrongful death can be stated either negatively or positively, and the result does not turn on the mere mode of expression. The pith of the matter is that the maritime law, as we conceived it, does not permit

> recovery, and in the same sense, in substance, the maritime law denied the survival of causes of action against a deceased tortfeasor. The maritime law would be supplemented or modified by state legislation in the one case as truly as in the other, and either supplement or modification is permissible in accordance with the accepted criteria.
>
> Our decisions in the wrongful death cases also meet the further argument which is addressed to lack of uniformity. For whatever lack of uniformity there may be in giving effect to the state rule as to survival is equally present when the state rule is applied to wrongful death, or, for that matter, in any case when state legislation is upheld in its dealing with local concerns in the absence of federal legislation. Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved.

Moragne does not sound inevitable preemption merely because of generation; if the maritime law can stand a state statute when there is no similar *judicially-created* rule there is no reason why it cannot when there is, in our structure of federation. Congress was not speaking in *Moragne*. The new right was judicially, not legislatively created.[2]

Historically, election where practical, not eradication,

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2. If it be conceded that a state could draw a local statute so repugnant to judicially created maritime law that the Constitution would not stand for it, the facts support no such contention in the case at bar. *Minnesota Rates Cases (Simpson & Shepard)* 230 U.S. 352, 57 L.Ed. 1511, 33 S.Ct. 729 (1916). But it would seem Congress would decide what is "so repugnant."

has been the solution to the fundamental question of preemption created by Admiralty jurisdiction. When this Court swept the Admiralty upstream of the tide-waters throughout the heartland of the nation a fundamental constitutional question concerning preemption necessarily arose for the bench and bar trained at the common law there. Some members of this Court were adamantly against such expansion because of their fears of dangers to federation and freedom as they saw them, born of their desire to protect states rights and "born of the fact that the courts of admiralty were not courts of record, that they followed the practice of civil law, allowed no trial by jury, and administered an exotic system of law." *Southern Pacific Co. v. Jensen, infra*, at 37 S.Ct. 535, dissenting opinion of Mr. Justice Pitney. We may smile a bit now at their ardor,[3] but

3. "Some seem disposed to believe it [the advancement of the admiralty above tidewaters] of so little consequence as hardly to have been worth attention. But this is a great mistake. The controversy was not in England, and is not here, a mere struggle between salt and fresh water, sea and lake, tide and ordinary current, within a county and without, as a technical matter only. * * * But there are embedded beneath the surface three great questions of principle in connection with these topics, which possess the gravest constitutional character. And they can hardly be regarded as of little consequence here, and assuredly not less than they possessed abroad, where they involved, (1.) the abolition of the trial by jury over large tracts of the country, (2.) the substitution there of the civil law and its form for the common law and statutes of the states, (3.) and the encroachment widely on the jurisdiction of the tribunals of the State over disputes happening there between its own citizens. * * * And our fathers never could have meant, that parties, for matters happening within a county or state, should be dragged into admiralty any more than equity, if as full a remedy, and of as good a kind, existed in courts of law, where they could enjoy their favorite code and mode of trial. * * * Instead of being, as it once was there in England, a contest between courts of one and the same government, it may become here a struggle for jurisdiction between courts of the States and courts of the United States, always delicate and frequently endangering the harmony of our political system." *Waring v. Clarke*, 46 U.S. (5 How.) 441, 12 L.Ed 22, Justice Woodbury dissenting at 46 U.S. 469, *et seq.*

surely some of their sentiments have recently appeared in more sedate form: "We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and state law." *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 30 L.Ed.2d 383, (1971) at page 425.

Finally what pragmatic difference does preemption make here now, save possibly the question of dependency. The maritime law of survival damages, including recovery for loss of society, has just about coincided with the Louisiana state law. *Gaudet v. Sea-Land Services, Inc.*, 94 S.Ct. 806, 444 U.S. 573, 30 L.Ed.2d 9 (1974). Where two laws are substantially the same, there can be no real preemption of equalities whether they are identities or not. The Circuit Court's concern about inconsistencies pertaining to state law on national and international waters may be somewhat illusory, at least in Louisiana. Whether the application of the Louisiana death statute to state waters would, if error now, force a substantial federal question is doubtful. Compare, *Thompson v. Teledyne Movible Offshore, Inc.*, 419 So.2d 822 (La. 1982), appeal dismissed for want of substantial federal question ____ U.S. ____, 104 S.Ct. 48 (1983).

Election on national waters would coincide with Congress's intent of an election on international as plainly provided by the High Seas Act.

The Jensen Line On State Statutes.

The Jensen line was not drawn to fence out the use of all state statutes concerning casualty on state waters, *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S.Ct. 3524, 61 L.Ed. 1086 (1917). True in *Jensen* a state compensation act was barred despite a forceful assertion that it covered a

local maritime matter; but there this Court faced significantly distinguishing considerations: first, Jensen had asked that a New York compensation statute be applied to a "foreign" vessel owner; [If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other states may do likewise."] 37 S.Ct. 529; second, compensation was not a remedy at common law saved by the Judiciary Act; ["The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, . . .]; and third, and most important to the Southern Pacific, standing cast in judgment, Jensen may not have had an election, but a windfall of double recovery by way of accumulation of remedy that worked a burdensome surcharge on maritime commerce;[4] [In due time the Southern Pacific Company objected to the award . . . in that it denies the Southern Pacific Company the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution, because the Act does not afford an exclusive remedy, but leaves the employer and its vessel subject to suit in admiralty . . . . (37 S.Ct. 526)]. The decision was five, four, an insignificant fact, but the composition of the dissents was rather formidable, Justices Holmes, Brandeis, Pitney, and Clarke whose powerful opinions contain unforgetable language of relentless logic from the standpoint of history (which may have echoed lately in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980).

Justice Holmes and Justice Pitney took dead aim down long gunbarrels of practical logic and precedential history to

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4. Or, conversely, that there would be no election because the state compensation statute arrogated to itself the exclusive remedy: "Except for the [state] statute, an action [for damages] may have been brought in a court of admiralty." *Southern Pacific Company v. Jensen, supra*, Mr. Justice Pitney dissenting at 37 S.Ct. 532.

bring the majority opinion under withering crossfire:

> In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and emforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the state courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. * * * Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although Congress has the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the states. * * *

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject-matter can be raised *by implication*, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the states

> than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce, - the limited effect of which, in the absence of legislation by Congress, we already have seen. [From Justice Pitney's dissent, 37 S.Ct. 540, et seq.]

What About Higginbotham?

Mobil Oil Corporation v. Higginbotham, 436 U.S. 618, 56 L.Ed.2d 581, 98 S.Ct. 2010 (1978) did not raise the point involved here; there, the widow simply argued that the general maritime law supplemented the High Seas Act; she claimed that *Moragne* and its kin gave her these damages; this Court held that the High Seas Act was not supplemented by the general maritime law in that respect; this Court refused to allow "a desire for uniformity" to override the High Seas Act. Here, suit is upon and under the High Seas Act and its savings clause, invoking state law as the Outer Continental Shelf Act invokes state law. *Higginbotham's* call for strict interpretation favors state law in the present case under the High Seas Act's savings clause.

Surrogate Law.

The Circuit Court in the present case found that the Louisiana death statute was extraterritorial and thus applied to Louisiana citizens on the high seas. This finds historic support in *The E. B. Ward, Jr.*, 17 Fed. Cas. 456 (1882), where the Louisiana Statute was applied on the high seas. The author of the decision in the present case is very familiar with Louisiana law, as a lawyer, as a district and a circuit judge, with years of experience. Conclusions concerning state law are rarely reviewed and presumptively correct, *The M/V "Tungus" v. Skovgarrd*, 358 U.S. 588, 79 S.Ct. 503, 509 (1959): "The Court of Appeals *en banc*, has given careful consideration to the meaning of the state statute. We cannot

say that its conclusion is clearly wrong; therefore despite the inherent uncertainties involved we will not disturb the court's interpretation of the New Jersey law. Such a course is consistent with the practice that has been followed in the past."

CONCLUSION

If the copters in the present cases had crashed into platforms offshore, killing the workers aboard who were going to work, and also killing workers on the platform below waiting to get aboard to go home, those workers killed aboard the helicopter would be covered by the High Seas Act, those killed while waiting on the platform, the Shelf Act. Compare, *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir., 1982) with *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). In the firey inferno created by the crash into the platform different laws would apply although all of the workers were killed mere feet apart. But the Shelf Act would invoke surrogate Louisiana law for those killed while waiting on the platform; the Circuit Court's decision here, that there is an election under the High Seas Act that would allow those workers killed aboard the craft to be treated the same, would result in a consistency that seems desirable policy. It is hard to explain to a family how they can sue on the Louisiana law in the one case but not the other though the crash of the copter kills them all.

The same for state waters; if a blue water cruise ship explodes while moored to the wharf in New Orleans, killing both passengers aboard ready to debark and members of their families waiting on the wharf below, it would seem desirable that the families of all, whether aboard or ashore, could elect to come under Louisiana law, the Extension Act notwithstanding.

We understand that the admiralty tends towards fine

distinctions, but there is no reason for such distinction here because Congress has said that there need not be one if there is an election to that effect. This is the clear purport of the statute, adequately supported legislatively and judicially.

If Beth Tallentire had elected to bring her suit under the French law against a summoned French defendant responsible for the death of her husband on the high seas under the savings clause pertaining to laws of foreign states (46 US 764), doubtless the District Court would have allowed her to do so without giving it a thought – how can a Frenchman object to obeying French law?

What is the difference here where she elects to stand on the laws of a domestic state, that Congress did not repeat itself twice when creating her election? That Congress must work a charm by triple incantation before its mandate, so plain and clear, will be given effect? Surely not, we respectfully submit.

The judgment of the Court of Appeals for the Fifth Circuit of the United States, in the present case should be affirmed.

Respectfully submitted,

William Rutledge mce

William Rutledge of
Domengeaux & Wright
Amicus Curiae in support of
Beth Tallentire et al, respondents.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January, 1986, three copies of the Brief Amicus Curiae in Support of Respondents, Tallentire, et al, by Domengeaux & Wright were mailed postage prepaid to:

Farley Sonnier, Esq.
Post Office Drawer 2908
Lafayette, Louisiana 70502

Charles Hanemann, Esq.
300 Lafayette Street
Houma, Louisiana 70360

Ronald A. Johnson, Esq.
701 S. Peters – Suite 300
New Orleans, Louisiana 70130-1632

Keith Jones, Esq. (By Air)
1150 Connecticut, N.W., Suite 400
Washington, D. C. 20036.

I further certify that all parties required to be served have been served.

William Rutledge

APPENDIX

APPENDIX

The Towanda, 24 Fed. Case 74, Case No. CN 14, 109 (C.C., D.D. Penn., 1877) [maritime survival action for death on high seas apparently *in personam* against the master of the vessel]; *The City of Brussels*, Case No. 2,745 [6 Ben. 370] (D.C. S.D. N.Y., 1873) [*in rem* by the administrator of a deceased minor who perished in passage apparently on the high seas by poisoning, sustained on theory of breach of maritime contract of passage]; *Cutting v. Seabury*, Case No. 3,521 (D.C. Mass., 1860) [assumed that maritime action survived for death of minor on high seas *in personam*]; *Western Fuel Co. v. Garcia*, 255 F.839, rev'd 260 F. 838 (9th Cir., 1919) [dicta to the effect that state death act is a vehicle for recovery for death on the high seas: "It is well settled that, in the absence of an Act of Congress or a statute of a state giving a right of action therefor, a suit in admiralty cannot be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or on waters navigable from the seas. . . . (Page 819)]; *The Sagamore*, 247 F. 743, (1st Cir., 1977) [dicta that a state death statute can impose liability upon ships and citizens of that state for death on the high seas; "While the statute 'offers a liability' of Massachusetts owners to those injured, it does not follow that it may impose a liability upon citizens of another state who are without its territorial jurisdiction. Its authority over its own ships and citizens does not extend to the ships and citizens of another nation.]; *The Columbia, (The Alaska)*, 27 F. 704 (D.C. S.D. N.Y., 1886), [maritime survival for death on high seas independent of statute and apparently *in rem* recognized: "As respects the right to recover damages in admiralty for the loss of life by the wrongful conduct of vessels on the high seas, some differences are found in the adjudications. . . ."; *The Manhasset*, 18 F.918 (D.C.E.D. Va., 1884) [State death act referring to the defendant as

"a person or corporation" cannot give a lien *in rem* for death on navigable waters whatever their character, the uniformity of maritime law emphasized, but with no consideration of the citizenship of the vessel involved; citing other cases refusing to bestow the lien with no discussion of the character of the waters involved; but with implication that suit *in personam* under the statute would lie.]

The intriguing question, seemingly to the point of obliviousness to all else, was not a cause of action for death upon the high seas created by local statute, but the remedy of a maritime lien raised by such statute for death there, with possible international complexities. Some negative arguments though prevailing in the very case seemed more trivial than triumphant; *The Vera Cruz*, 10 AC 59: "Earl of Selborn L.C.. Lord Campbell's Act says 'whenever the death of a person shall be caused by wrongful act, neglect or default.' Are those words applicable to an inanimate thing like a ship, which is not capable of doing wrong?"

There was concern about marring the uniformity of maritime law with state statutes; worry over international incident in a particular case; and preoccupation about concept. *Armstrong v. Beadle*, Case No. 541 (Cir. Ct., D. Calif., 1879): "If California can pass laws of this kind, operating extra-territorially, then other states and countries can pass laws upon the same subject operating upon the high seas, and these laws may be in conflict; but there is nothing in the statute to indicate that it was intended to operate beyond the limits of the state."; *The Alaska*, 130 U.S. 201, 9 S.Ct. 461, 463 (1889): "It is admitted by the counsel for the libelants that the statute of New York, (Code Civil Proc. Sec. 1902) on the subject of actions for death by negligence, does not apply to the present case, because the deaths did not occur within the state of New York, or in waters subject to its jurisdiction. It is further to be said that the statute

gives a right of action only to the executor or administrator of the deceased person, while the present suit is brought by widows; and that the statute provides only for a suit against an individual person or a corporation, and not for a proceeding *in rem*. . . . The question involved and decided in that [*Harrisburg*] case was whether the admiralty courts of the United States could take cognizance of a suit to recover damages for the death of a human being on the high seas *or* on waters navigable from the sea, caused by negligence, in the absence of an Act of Congress *or* a statute of a state giving a right of action therefore."; *The Manhasset*, (D.C. E.D. Va., 1884) 18 F. 918, in a case involving death on *state waters* at page 920: "But the state [death] statute gives a very different right. It empowers an administrator to sue for the benefit of certain next of kin, [dependancy not being required by the statute] and these next of kin may be neither father, nor mother, nor minor child, but most of them may be adult children like those of this man Black, or others having no natural right to damages for the killing of an intestate. It is essentially a statutory right and it is unknown to the maritime law. Can a statutory right, unknown to it before, be introduced into that law by state legislation, and can a person unknown to that law sue in an admiralty court on that right? Let us consider what the maritime law is, how it arose, and how far it may be changed by local legislation. . . . After its claim to be founded on principles of natural justice, its highest value consists in its worldwide uniformity and acceptance * * * As an action by an administratrix for the benefit of certain next of kin of W. H. Black, based upon a right created by state law, and unknown to the law maritime, I must hold that this libel [*in rem*] cannot be sustained, and must be dismissed. But it shall be without prejudice and without costs. I have already virtually expressed the opinion that the widow of this deceased man, Black, and his minor children, have a right of action, by libel *in rem*, [under the general maritime law because of their actual dependancy] against

the ferry boat *Manhasset*, in their own name, for their own benefit."; *The E.B. Ward, Jr.*, 16 F. 255 (Cir. Ct. E.D. La., 1883) at page 257: "The operation of the [state death] statute was intended to be confined to establishing a rule of survivorship for the government of the community to constitute the state of Louisiana and could not include a cause which did not concern its inhabitants and did not originate within its territory; and, least of all, could it give a lien upon or authorize an action against a vessel." *The Vera Cruz*, 10 A. C. 59 (1884) at page 66: [". . . well, it is to my mind, as plainly as possible, a personal action given for a person injury inflicted by a person who would have been liable to action of damages, manifestly in the common law courts, if the death had not ensued;" to the grievance of the widowed husband that "where the offending ship is foreign, as here, the representatives of the person killed have practically no remedy except by an action *in rem*," the Lords fretfully replied in terms of international incident: "For instance, no one seems to have thought of the case of a Swedish ship or a French ship on the high seas drowning an Englishman and afterwards coming into England. There would have been a very serious international question raised in that case whether the English legislature had enacted (as it beyond doubt had full power to enact) that when the ship came into England there should power to enforce against the Frenchman or the Norweigan reparation for the loss of life which his own law did not give, though the accident which caused it happened on the high seas."] *Holliday v. The David Reeves*, Case No. 6,625, 12 Fed. Cases 386 (1879); [libel *in rem* on theory of maritime survival, independent of statutory remedy, allowed without discussion of character of waters.]

AMICUS CURIAE

BRIEF

(13)
Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
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NO. 85-202

In the Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner

v.

BETH TALLENTIRE, ET AL,
Respondent

AIR LOGISTICS, A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE LOUISIANA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

DREW RANIER, ATTORNEY
BAGGETT, McCALL
& RANIER
P. O. Box 1645
1130 Pithon Street
Lake Charles, LA 70602
(318) 436-6678

LOUISIANA TRIAL
LAWYERS ASSOCIATION
P. O. Box 4289
442 Europe Street
Baton Rouge, LA 70802
(504) 838-5554

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Whether plaintiffs may be denied their state wrongful death remedies preserved by Section 7 of the Death on the High Seas Act, 46 USC 767 et seq:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

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BRIEF FOR THE LOUISIANA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

MOTION TO FILE AMICUS CURIAE BRIEF

On the motion of Louisiana Trial Lawyers Association through undersigned counsel, and on representing that counsel is the Secretary-Treasurer of the Louisiana Trial Lawyers Association and has been duly authorized to move the Court to grant permission for the filing of an amicus curiae brief; and on further representing that the Louisiana Trial Lawyers Association is an organization composed of 2,500 practicing lawyers who primarily represent injured individuals, and that approximately one-half of this

membership practices largely or exclusively in the field of maritime and offshore law; and on further representing that movers respectfully represent that no other organization can speak with the authority of the Louisiana Trial Lawyers Association for injured workers in the maritime and offshore industry of Louisiana; and on further representing that there are significant issues of maritime, offshore and Louisiana law which will directly or indirectly affect thousands of Louisiana workers affected by the Court's decision in this case; and on further representing that the Louisiana Trial Lawyers Association seeks to appear to support and supplement and offer its own arguments in support of the respondents Corine Ann Soudelier Taylor and Beth Tallentire;

The Louisiana Trial Lawyers Association hereby respectfully moves this Honorable Court to allow its appearance and filing of its brief as amicus curiae.

All petitioners and respondents have given oral consent to filing of this amicus brief; but written consent, requested by letter, has not been received from all parties.

Respectfully submitted,

BAGGETT, McCALL & RANIER
(A Professional Law Corporation)

DREW RANIER
P. O. Box 1645
1130 Pithon Street
Lake Charles, LA 70602

LOUISIANA TRIAL LAWYERS
ASSOCIATION
442 Europe Street
P. O. Box 4289
Baton Rouge, LA 70802

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BRIEF FOR THE LOUISIANA TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE LOUISIANA TRIAL LAWYERS ASSOCIATION

The members of the Louisiana Trial Lawyers Association represent thousands of maritime and offshore

workers who have been injured or killed, and their families. The organization, on behalf of its members and their clients, has a strong interest in the preservation of state remedies within the maritime law as provided by the Death on the High Seas Act, 46 USC 761, et seq.

STATEMENT

The sole issue before the Court is whether Section 7 of the Death on the High Seas Act, 46 USC 767, will be applied as it was written by Congress:

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

The Fifth Circuit Court of Appeals read the statute as written and applied Louisiana wrongful death law remedies to an accident involving Louisiana plaintiffs and Louisiana defendants thirty miles off the Louisiana coast. State remedies on the high seas were recognized long before the passage of the Death on the High Seas Act in 1920, specifically in *The Hamilton*, 207 U.S. 264 (1907) and preserved in Section 7 of the Death on the High Seas Act quoted above. If Section 7 of the Death on the High Seas Act needs to be changed, then Congress not the Courts should change it. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 56 L. Ed. 2d 581, 98 S.Ct. 2010 (1978).

SUMMARY OF ARGUMENT

Section 7 of the Death on the High Seas Act, 46 USC 767, provides explicitly for the preservation of state remedies on the high seas.

> "The provisions of any state statute giving or regulating rights of action or remedies for death shall not be affected by this chapter."

State remedies on the high seas were recognized long before the passage of the Death on the High Seas Act in 1920, and specifically in *The Hamilton*, 207 U.S. 264 (1907).

If Section 7 of the Death on the High Seas Act needs to be changed, then Congress not the Courts should change it. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978).

ARGUMENT

1. Congress did not explicitly preserve state statutes only to see them disregarded by the Courts. The pertinent section of the Death on the High Seas Act states:

> "The provisions of any state's statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any state, or to any navigable waters in the Panama Canal Zone."

46 USC 767.

The Fifth Circuit was correct in applying the statute as it is written. If Congress had intended to preserve state remedies only within territorial waters, as the applicants contend, then there was no reason to add the first sentence quoted above, since the second sentence specifically states that the act is not applicable in territorial waters. Therefore, the first sentence logically expresses Congress' intent to preserve those state remedies on the high seas. When the statute is clear, it should be applied as it is written. To decide that Congress did not mean what it said or that what it said was not what it meant should be left to Congress and not to the court. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978). One should look to the Congressional history only when the plain language of the statute creates an uncertainty, which it does not do in this case. It is only lawyers who seek to create uncertainty in this very plain language.

2. Uniformity of maritime law is subservient to Congressional intent. In *Higginbotham, supra*, this Court had the opportunity to make maritime wrongful death virtually completely uniform with the application of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970) to the high seas, and expressly chose not to do so, relying on Congressional intent as evidenced by the plain language of the Death on the High Seas Act. Nevertheless, even if one were to concede that uniformity should prevail, it can be argued that application of the statute as written supports the Court's goal of uniformity in the maritime law, i.e. whatever differences exist among state wrongful death actions are minor compared to the differences between a pecuniary remedy and Moragne-state law remedies, which allow general damages in addition to pecuniary loss.

3. DOHSA should continue to serve its remedial purpose where state law remedies are not available. If, unlike the present case, contacts with Louisiana or another state, had not been sufficient to apply state law, then DOHSA does and will apply.

4. In *The Hamilton*, 207 U.S. 264 (1907), this Court approved the application of state law on the high seas in appropriate cases:

> "Authority would exist to citizens domiciled within the state, even when personally on the high seas, and not only could be enforced by the state in case of their return, which their domicile by its very meaning promised, but, in proper cases, would be recognized in other jurisdictions by the courts of other states."

207 U.S. 269.

5. General damages and the maritime law have been traditionally compatible. Except where statutory rules are directly to the contrary, such as in *Higginbotham, supra*, this Court has upheld the remedial nature of the maritime law and general damages. *Moragne v. States Marine Lines, Inc., supra; Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 39 L. Ed. 2d 9, 94 S. Ct. 806 (1974).

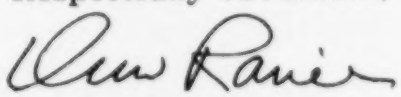
Wrongful death statutes and jurisprudence in most if not all states provide for awards of general damages. See for example, Louisiana Revised Statutes, Louisiana Civil Code, Article 2315, and Texas Revised Statutes Article 4671. This element of damages is an expression by civilized societies of the value of loss of close family ties and relations on which the society is built, and at least as important if not more important than actual pecuniary loss.

CONCLUSION

When the states in their wisdom provide remedies, and when Congress in its wisdom preserves state remedies, this Court should do as the Fifth Circuit did and not circumvent their application.

Section 7 of the Death on the High Seas Act mandates that". . . state remedies for death shall not be affected by this chapter." Let Congress' will be done, and let state remedies not be affected.

Respectfully submitted,



DREW RANIER
Baggett, McCall & Ranier
P. O. Box 1645 - 1130 Pithon Street
Lake Charles, LA 70602
(318) 436-6678

Attorneys for the Louisiana Trial Lawyers Association, as Amicus Curiae

AMICUS CURIAE

BRIEF

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE TEXAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE POSITION OF THE RESPONDENTS

ROBERT A. CHAFFIN*
PAUL R. MILLER
FRIEDMAN & CHAFFIN
3500 Travis
Houston, Texas 77002
713/528-4141
Attorneys for Amicus Curiae, the Texas Trial Lawyers Association
*Counsel of Record

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

23 pp

QUESTION PRESENTED

Whether, in light of Section 7 of the Death on the High Seas Act, state causes of action for wrongful death may be applied to wrongful deaths occurring on the high seas.

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NO. 85-202

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OFFSHORE LOGISTICS, INC.,
Petitioner

v.

BETH A. TALLENTIRE,
Respondent

AIR LOGISTICS,
A DIVISION OF OFFSHORE LOGISTICS, INC.,
Petitioner

v.

CORINE ANN SOUDELIER TAYLOR,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE TEXAS TRIAL LAWYERS ASSOCIATION IN SUPPORT OF THE POSITION OF THE RESPONDENTS

CONSENT OF PARTIES

This brief amicus curiae in support of the position of the Respondents is filed with the written consent of the parties, pursuant to Sup. Ct. R. 36.2.

STATEMENT OF INTEREST

Amicus Curiae, the TEXAS TRIAL LAWYERS ASSOCIATION, is a statewide bar association composed of lawyers who primarily represent the plaintiffs in personal injury litigation. The members of the association include lawyers who practice maritime law on behalf of injured seamen, offshore oilfield workers, and longshoremen as well as on behalf of their dependents should death occur. Many of these lawyers are members of the association's Admiralty Section, which has sought to take an active part in the development of the law applied in maritime death cases.

The Court's decision in the instant case will have a profound effect upon the lives of the families who lose a loved one due to wrongful death occurring on the high seas. Under DOHSA acting alone, no recovery is allowed these family members for the loss of society they suffer when a husband, wife, father or mother is killed by the negligent acts of another on the high seas. In Section 7 of DOHSA, 46 U.S.C. § 767, however, Congress clearly allows applicable state law to supplement DOHSA. Many state wrongful death laws, in turn, allow recovery for the very real and substantial loss of society these dependents are forced to suffer. The right of state law supplementation provided in Section 7 also provides the right to trial by jury, a right traditionally lacking from admiralty.

The Mann Amendment, which deleted language from a draft of DOHSA which would have arguably restricted state wrongful death remedies to the territorial waters, was passed by a vote of 201 to 75 in the House of Representatives and approved by the Senate. The amendment was intended to preserve the state law remedies and

the right to trial by jury both in territorial waters and on the high seas. The TEXAS TRIAL LAWYERS ASSOCIATION seeks to represent the views of the families of those who die at sea, the very persons the Mann Amendment was intended to benefit.

STATUTORY PROVISION INVOLVED

This case involves the construction of Section 7 of the Death on the High Seas Act (DOHSA), 46 U.S.C. § 767:

> § 767. Exceptions from operation of chapter.
>
> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

STATEMENT OF THE CASE

Briefly stated, the case involves claims for damages brought under DOHSA, the Louisiana wrongful death statute, and the Outer Continental Shelf Lands Act (OSCLA), 43 U.S.C. § 1331 et seq., for the deaths of two Louisiana offshore platform workers killed when the helicopter in which they were passengers crashed more than three miles off the coast of Louisiana.

SUMMARY OF ARGUMENT

The Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 et seq., was enacted by Congress in 1920. The statute provides a cause of action for wrongful death caused by neglect or default occurring on the seas more

than three miles from shore. Section 7 of DOHSA, 46 U.S.C. § 767, provides in rather unambiguous language "[t]hat the provisions of any State statute giving or regulating rights of action or remedies for wrongul death shall not be affected by this Chapter. . . ." Through the plain language of Section 7 Congress chose to allow state wrongful death remedies to be applied simultaneously with DOHSA.

This Court has held on numerous occasions that federal law will preempt applicable state law only under a very narrow set of circumstances. The Court begins with the presumptions that (1) areas of traditional state regulation will not be superseded by an act of Congress absent a *clear and manifest purpose of Congress to preempt state law* and (2) that *the ordinary meaning of the words chosen by Congress accurately express the legislative purpose*. Building from these cornerstones, preemption may arise from (1) express language in the federal statute; (2) a congressional scheme of regulation sufficiently comprehensive so as to enable the inference that Congress intended federal law to be exclusive; or (3) from a federal interest in the field which is so dominant as to preclude enforcement of state laws. Applying these often repeated preemption standards to DOHSA, the only conclusion that can be drawn is that DOHSA does not preempt, but instead expressly allows, the application of state wrongful death remedies within its area of coverage.

Prior to the enactment of DOHSA, state wrongful death laws provided the only remedy for death on the high seas. No remedy existed under federal law, either by statute or the General Maritime Law, for wrongful death at sea. Rather than making DOHSA the exclusive remedy for death on the high seas, Congress specifically stated in Section 7 that DOHSA would have no affect upon the

application of state wrongful death statutes. The language and legislative history of DOHSA simply do not evince a clear and manifest purpose on the part of Congress to preempt state death law or to comprehensively regulate wrongful death on the high seas so as to exclude the traditional state remedies. Instead, the Act expressly leaves state remedies unaffected. Further, this Court has stated on no less than six occasions in the past that maritime wrongful death is one area of maritime law where uniformity is not required and where state law can coexist with federal law. Such statements hardly indicate a federal interest so dominant as to preclude application of state law.

The Petitioners urge the Court, in the interest of uniformity, to overlook the plain language of section 7 of DOHSA. Just a few years ago, however, the Court stated in its most recent decision involving DOHSA that "a desire for uniformity cannot override the statute." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 624 (1978). As it did in *Higginbotham,* this Court should decline an invitation to judicially erase language from DOHSA in order to achieve uniformity. Such an invitation is properly addressed to Congress and not to the courts. The decision of the Court of Appeals for the Fifth Circuit as to the applicability of state wrongful death statutes should be AFFIRMED.

ARGUMENT

The question presented in this case is a simple one—does DOHSA preempt state wrongful death remedies within its territory of coverage? This Court has held in the past that a federal remedy may preempt similar state remedies only in certain limited circumstances. Preemp-

tion can be found if (1) Congress so states in express terms or (2) if Congress creates a scheme of regulation sufficiently comprehensive so as to make reasonable the inference that it did not intend to allow the application of supplementary state laws or (3) if the area regulated by the federal statute is one in which the federal interest is so dominant that state laws on the same subject will have no effect. *Hillsborough County v. Automated Medical Laboratories, Inc.*, ____U.S.____, 105 S. Ct. 2371, 2375 (1985).

In a preemption analysis the Court begins "with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Metropolitan Life Insurance Co. v. Massachusetts*, ____U.S.____, 105 S. Ct. 2380, 2389 (1985) *quoting Park 'n Fly v. Dollar Park and Fly, Inc.*, ____U.S.____, 105 S. Ct. 658, 662 (1985). Put another way, the Court's "task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) *quoting Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Further, "[w]here . . . the field that Congress is said to have pre-empted is one which has been traditionally occupied by the States, [the Court] . . . 'start[s] with the assumption that the historic Police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Hillsborough County v. Automated Medical Laboratories, Inc., supra*, ____U.S.____, 105 S. Ct. at 2376 *quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Construing DOHSA in accordance with the "preemption" standards set forth above can only result in the conclusion that DOHSA does not preempt state wrongful death remedies on the high seas.

Prior to the enactment of DOHSA, no federal right of action existed for wrongful death on navigable waters. *See, The Harrisburg*, 119 U.S. 199 (1886). State acts were applied to allow recovery for wrongful death, both in state territorial waters, *American Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1872); *Sherlock v. Alling*, 93 U.S. 99 (1876),[1] and on the high seas, *The Hamilton*, 207 U.S. 398 (1907) (Holmes, J).[2] It was against this background that Congress in 1920 enacted DOHSA, which provided a federal remedy for death caused by wrongful act, neglect or default occurring on the seas more than three miles from shore. 46 U.S.C. § 761 *et seq.*

The bill which eventually became DOHSA originated in the Senate. S. 2085, 58 Cong. Rec. 1206, 66th Cong.,

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1. *See also Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527 (1889); *Cornell Steamboat Co. v. Fallon*, 179 F. 293, 295 (2d Cir. 1909), *cert. denied*, 216 U.S. 623 (1910); *The City of Norwalk*, 55 F. 98, 108 (S.D.N.Y. 1893) *modified on other grounds* 61 F. 364 (2d Cir. 1894); *Holmes v. O. & C. Ry. Co.*, 5 F. 75, 86 (D. Or. 1880); *Souden v. Fore River Ship Building Co.*, 223 Mass. 509, 510, 112 N.E. 82, 83 (1916); *Opsahl v. Judd*, 30 Minn. 126, 129-30, 12 N.W. 575, 576 (1883); *Mahler v. Norwich and New York Transp. Co.*, 35 N.Y. 352 (1866).

2. *See also, e.g., Southern Pacific Co. v. De Valle Da Costa*, 190 F. 689, 692 (1st Cir. 1911); *Int'l Navigation Co. v. Lindstrom*, 123 F. 475 (1903), *cert. denied*, 193 U.S. 699 (1904); *The E.B. Ward, Jr.*, 17 F. 456 (5th Cir. 1883) (applying Louisiana wrongful death action on the high seas); *The James McGee*, 300 F. 93, 96 (S.D.N.Y. 1924) L. Hand, J.); *Bolstad v. Pacific Coast S.S. Co.*, 244 F. 634 (N.D. Cal. 1917) (New Jersey worker's compensation statute held applicable to death occurring on the high seas); *Fisher v. Boutelle Transp. & Towing Co.*, 162 F. 994, 996 (E.D. Pa. 1906); *The Jane Grey*, 95 F. 693 (D. Wash. 1899); *McDonald v. Mallory*, 77 N.Y. 546, 554-56 (1879).

1st Sess. (1919). Once approved by the Senate without amendment, 58 Cong. Rec. 7172-73 (1919), the bill was forwarded to the House Judiciary Committee where it was referred without amendment to the House calendar on February 25, 1920. 59 Cong. Rec. 3484 (1920). When the bill was called on the House calendar on March 17, 1920, 59 Cong. Rec. 4482 (1920), Section 7 read in pertinent part as follows:

> SEC. 7 That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act *as to causes of action accruing within the territorial limits of any State*. . . .

Id. (emphasis added).

During the course of debate on the floor of the House an amendment was proposed by Representative Mann of Illinois. 59 Cong. Rec. 4484 (1920). The amendment called for the deletion of the words "as to causes of action accruing within the territorial limits of any State" from Section 7 of the bill, thus leaving that section to read in pertinent part:

> SEC. 7 That the provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this Act. . . .

Id.

The amendment proposed by Rep. Mann was debated by the small number of Congressmen present. Several views as to the effect of the proposed amendment emerged. Rep. Mann stated during the course of the debate that:

> If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with the rights now granted by any state statute, whether the cause of action accrued within the territorial limits of the state or not.

59 Cong. Rec. 4484 (1920).

During the House debate, a group of Congressmen consisting of Representatives Volstead, Montague, Igoe and Goodykoontz, took the view that DOHSA would be the exclusive remedy on the high seas, the amendment notwithstanding.[3] When the amendment was presented for vote, Rep. Mann called for a quorum and the amendment was voted on. 59 Cong. Rec. 4486 (1920). All of the Congressmen who felt that DOHSA would be exclusive remedy notwithstanding the amendment voted AGAINST the passage of the amendment. 59 Cong. Rec. 4486-87 (1920). Rep. Mann's view that state statutes would apply even if the death occurred on the high seas, however, won the day and the amendment was passed by a vote of 201 to 75. 59 Cong. Rec. 4486-87 (March 17, 1920).[4] The Mann Amendment was approved by the

3. 59 Cong. Rec. 4484 & 4485 (Rep. Volstead); 59 Cong. Rec. 4483 (Rep. Montague); 59 Cong. Rec. 4484 (Rep. Igoe); 59 Cong. Rec. 4485-86 (Rep. Goodykoontz).

4. As to the rights granted by state statutes, it was clear at the time of the passage of DOHSA in 1920 that state statutes could be applied to wrongful deaths occurring on the high seas. ***The Hamilton***, *supra*. Indeed, any Congressman choosing to read Judge Putman's letter, included in both the Senate and House Reports, would have been informed that in ***The Hamilton*** this Court had applied a state wrongful death statute to a death occurring on the high seas. Moreover, the holding of ***The Hamilton*** was referred to by Rep. Moore during the course of the House debate. 59 Cong. Rec. 4483 (1920). Clearly, the representatives were aware, when they voted on an amendment which would leave state wrongful death statutes unaffected by DOHSA, that state wrongful death statutes had been applied to deaths occurring on the high seas by the highest court in the nation. But even if the meaning of the debate in the House of Representatives were confusing or unclear, which it certainly is not, the plain language of the statute, which leaves state remedies unaffected, would still control.

Senate, 59 Cong. Rec. 4674 (1920), and DOHSA was signed into law on March 30, 1920. 59 Cong. Rec. 4992 (1920).

Faced with the clear language of Section 7 that DOHSA shall have no affect on the application of state wrongful death remedies, Petitioners and their supporters contend that DOHSA is exclusive because the legislative history shows that Congress intended it to be exclusive on the high seas. In support of this view they point to language in the House debate and to the House and Senate Reports.[5] Their arguments are flawed for two reasons.

First, all of the Congressmen who thought DOHSA to be exclusive on the high seas voted against the Mann Amendment. Petitioners contend, in effect, that the Court should determine the effect of the Mann Amendment in accordance with the views of those who opposed it and

5. Petitioners also rely upon a law review article written by Robert M. Hughes, who helped to write the bill which became DOHSA and was particularly familiar with the lines upon which the statute evolved. *See* Hughes, *Death Actions in Admiralty* 31 Yale L.J. 115 (1921). In reaching the conclusion that section 7 of DOHSA was a mere savings clause which would have no effect in light of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), and its progeny, Mr. Hughes did not consider the *Jensen* opinion itself, which cites *The Hamilton* for the proposition that state wrongful death states may be applied in admiralty without destroying the necessary uniformity. Nor did Mr. Hughes consider or discuss the Mann Amendment or the House debate.

Elsewhere in his article, Mr. Hughes concluded that death on land resulting from injuries received on the high seas would not fall within admiralty jurisdiction or within the provisions of DOHSA, (despite the clear language of 46 U.S.C. § 761), 21 Yale L.J. at 120, and that the survivors of a seaman have an action only under the Jones Act and not under DOHSA, *id.* 142-25. The courts which have since interpreted DOHSA have reached opposite conclusions. Given these seeming inaccuracies, it is surprising that others such as Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 25 Yale L.J. 395, 422-23 (1926), would rely solely upon Mr. Hughes' article to support the proposition that DOHSA was intended to be an exclusive remedy.

voted against its passage. Such a line of reasoning is, to say the least, novel.

Second, the Senate[6] and House[7] Reports on DOHSA were dated September 23, 1919 and February 25, 1920, respectively. The Mann Amendment, however, was not even proposed until March 17, 1920. While the Senate and House Reports do contain language to the effect that DOHSA was intended to be the exclusive remedy on the high seas, they predated passage of an amendment to the bill which, in the words of its author, would cause DOHSA "not to interfere *in any way* with the rights now granted by any state Statute, *whether the cause of action accrued within the territorial limits of the State or not.*" (emphasis added). Under these circumstances, the Senate and House Reports can be accorded no weight in determining the effect of the Mann Amendment.

Although Congress has clearly stated in Section 7 that DOHSA does not interfere with recovery under state statutes, Petitioners argue that considerations of uniformity require that DOHSA be the exclusive remedy on the high seas. A similar argument was made in *Mobil Oil Corp. v. Higginbotham, supra,* 436 U.S. at 623-24. In *Higginbotham,* it was argued that considerations of uniformity required that recovery of non-pecuniary damages be allowed under the *Moragne*[8] general maritime law wrongful death remedy in high seas death actions even though the plain language of DOHSA restricted recovery to pecuniary damages. The Court rejected this uniformity argument and upheld the language of the statute, holding that:

6. S. Rep. No. 181, 66 Cong., 1st Sess. (Sept. 23, 1919).

7. H.R. Rep. No. 674, 66 Cong., 2d Sess. (Feb. 25, 1920).

8. *Moragne v. States Marine Lines Inc.*, 398 U.S. 375 (1970).

> In this case, however, we need not pause to evaluate opposing policy arguments, Congress has struck the balance for us. . . . It is true that the measure of damages in coastal waters will differ from that on the high seas, but even if this difference proves significant, *a desire for uniformity cannot override the statute.*

436 U.S. at 623-24 (emphasis added). The *Higginbotham* Court further noted that:

> Perhaps the wisdom we possess today would enable us to do a better job of reputiating the *The Harrisburg* than Congress did in 1920, but even if that be true, *we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.*

436 U.S. at 625-26 (emphasis added). The message of *Higginbotham* is *not,* as Petitioners and their supporters contend, that DOHSA is the exclusive remedy for wrongful death on the high seas. Instead, *Higginbotham* stands for the proposition, as do many of this Court's other opinions, that the courts are not free to rewrite statutes which have been duly enacted by Congress. If any change should be made to Section 7 of DOHSA, it would seem that that change must be made by Congress and not by the Court.[9]

Recognizing the infirmity of their argument concerning the meaning of Section 7, Petitioners suggest that state wrongful death statutes could not constitutionally be ap-

9. As the Court made clear in *Higginbotham,* the question in that case was "whether, in addition to the damages authorized by a federal statute, a decedent's survivor may also recover damages *under the general maritime law.*" 436 U.S. at 618 (emphasis added). The Court was not asked in that case to consider the application of state law to a death occurring on the high seas.

plied to the high seas due to needs for uniformity in maritime law. In support of this position, Petitioners rely upon *The Lottawanna,* 88 U.S. (21 Wall.) 558 (1874), as well as *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917) and its progeny. Petitioners reliance upon the *Jensen* doctrine is misplaced for at least three reasons.

First, as Petitioners acknowledge, the *Jensen* opinion itself listed wrongful death as one area of maritime law in which uniformity was not required. *Jensen, supra,* 244 U.S. at 216.[10] In support of this statement, Justice McReynolds cited *The Hamilton,* a case in which the Court held that a state wrongful death statute could be applied to a death occurring on the high seas.

Second, the basis for the *Jensen* opinion is questionable. As is noted by Messrs. Gilmore and Black in *The Law of Admiralty* at 405-06 (2d ed. 1974), *dictum* regarding uniformity found in *The Lottawanna* "was taken completely out of context" as essentially the only basis for the 5-4 decision by Justice McReynolds in *Jensen.* In *The Lottawanna,* the Court held that state law was valid to confer a lien which could be enforced *in rem* against a vessel for supplies and repairs furnished to the vessel

10. Statements in the following cases also stand for the proposition that uniformity is not offended by the application of state wrongful death acts to maritime deaths: *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 373 (1959); *The Tungus v. Skovgaard,* 358 U.S. 588, 594 (1959); *Just v. Chambers,* 312 U.S. 383, 388, 392 (1941); *Western Fuel Co. v. Garcia,* 257 U.S. 233, 242 (1921); *The Hamilton, supra,* 207 U.S. at 404-05. In addition, state survival actions have been applied to high seas deaths, both before and after this Court's decision in *Moragne v. States Marine Lines, Inc., supra,* without violating policies of uniformity. *See Dugas v. National Aircraft Corp.,* 438 F.2d 1386, 1388-1392 (3d Cir. 1971) and cases cited therein. As to the old "maritime but local" doctrine, it is hard to comprehend how the facts of this case are any less local than the facts of the cases set forth above, some of which involve foreign vessels and parties.

in her home port. While suggesting that perhaps a uniform law on the subject would be more appropriate, Justice Bradley made the *comment,* so heavily relied on by the Petitioners herein, that "the Constitution must have referred to a system of law coextensive with and operating uniformly throughout the whole country." This language, which was entirely unnecessary to the decision in *The Lottawanna,* was later relied upon in *Jensen* and other cases to limit the application of state workers compensation laws to injuries occurring on navigable waters.

Third, the application of *Jensen* has long been criticized and consequently has been limited to cases involving state workers compensation laws. As Justice Black noted in *Standard Dredging Corp. v. Murphy,* 319 U.S. 306, 309 (1943), when the Court was asked to extend the doctrine to prevent state unemployment compensation laws from reaching maritime employees:

> The Jensen Case has been severely limited, and has no vitality beyond that which may continue as to state workers compensation laws.

(citations omitted). *Cf. Ray v. Atlantic Richfield Co.,* 435 U.S. 148 (1978) (standard preemption analysis rather than *Jensen* analysis used to determine whether Washington state laws pertaining to the design, size and movement of tankers in Puget Sound were preempted by federal law).

Since the clear language of the statute allows application of state wrongful death laws and such application does not offend the need for uniformity in maritime law, state laws can and should be applied to allow recovery in high seas death cases. Their application in such cases will not reek havoc, as predicted by Petitioners. The

federal courts have dealt with concurrent remedies and conflict of laws problems successfully for years. Assuming that a state has sufficient contacts to constitutionally apply its law to a particular high seas death case, the wrongful death law of that state could be applied as a supplement to DOHSA. A conflict between DOHSA and state law would only arise if it was *physically impossible* to comply with both laws, *see Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43 (1963). Petitioners have cited no such situations of physical impossibility to comply with both laws and it is doubtful that there will be many. Problems with beneficiaries can be worked out as they have been for years when dealing with the differing set of beneficiaries found in DOHSA and the Jones Act, 46 U.S.C. § 688. *See generally, Moragne, supra,* 398 U.S. at 406-07. If recovery is forbidden under state law as the result of a defense not recognized under DOHSA, then recovery will only be made under DOHSA. Such "problems" clearly do not require the Court to judicially erase the first line of Section 7 of DOHSA.

CONCLUSION

Prior to the enactment of DOHSA, the courts had held that state causes action for wrongful death could be applied to allow recovery for deaths occurring on the high seas. The *Jensen* Court noted less than three years prior to DOHSA's enactment that uniformity was not required in the area of maritime wrongful death and in so doing reaffirmed the validity of state wrongful death actions on the high seas. Against this background, Congress passed DOHSA, which gave a cause of action for wrongful death occurring on the high seas. Section 7

of DOHSA, which emerged after an amendment was proposed and approved by both the House of Representatives and the Senate, expressly declares that state rights of action and remedies for wrongful death shall remain unaffected by DOHSA. The Court is now asked by Petitioners to erase the first sentence of Section 7, thus making DOHSA an exclusive remedy. Amicus believes the Court should decline the invitation to rewrite a statute which has been duly enacted by Congress.

Respectfully submitted,

ROBERT A. CHAFFIN
PAUL R. MILLER
FRIEDMAN & CHAFFIN
3500 Travis
Houston, Texas 77002
713/528-4141

Attorneys for the Texas Trial Lawyers Association, as Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of January, 1986, copies of the foregoing document were served upon counsel of record for all parties by depositing the same in a United States post office or mailbox, first-class postage prepaid, addressed as listed below:

Keith A. Jones
Fulbright & Jaworski
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

Charles Hanemann
Henderson, Hanemann & Morris
300 Lafayette St.
Houma, LA 70360

V. Farley Sonnier
Davidson, Meaux, Sonnier & McElligott
810 South Buchanan St.
Lafayette, LA 70502

ROBERT A. CHAFFIN